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In The
Supreme Court of the United States

NORMA MCCORVEY,
FORMERLY KNOWN AS JANE ROE,

Petitioner,

v.

WILLIAM "BILL" HILL, DALLAS COUNTY
DISTRICT ATTORNEY AS SUCCESSOR
IN OFFICE TO HENRY WADE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Norma McCorvey, the former "Jane Roe" in *Roe v. Wade* comes before this Court as an original party asking that the judgment in this case be vacated pursuant to FRCP Rule 60(b). Since the original judgment in *Roe v. Wade*, factual conditions surrounding abortion have changed significantly demonstrating that abortion hurts women. Evidence of those changed factual conditions includes: the testimony of women harmed by abortion; medical studies documenting abortion injuries; an explosion of knowledge since 1973 concerning the effects of abortion on women; and, the fact that abortion clinics do not provide the normal doctor-patient relationship anticipated by *Roe*. There have also been significant changes in legal conditions, including forty-six states that have enacted laws transferring the burden of unwanted child care to society, and this Court's Federalism jurisprudence restoring more autonomy to the states. The *Roe* decision is also a case of great national importance, and therefore, the questions presented are:

1. Should the original judgment in *Roe v. Wade* be vacated under Rule 60 due to the substantially changed factual and/or legal conditions that make *Roe* no longer just or equitable for prospective application?

2. Is Petitioner Norma McCorvey entitled under Rule 60 to any relief, substantive or procedural?

3. Should the Court, at a minimum, require a hearing to afford fundamental due process which would lead to determining whether *Roe v. Wade* should be re-examined?

PARTIES TO THE PROCEEDINGS

Petitioner is Norma McCorvey, the original "Jane Roe" of *Roe v. Wade*.

Respondent is William "Bill" Hill, District Attorney of Dallas County, as successor in office to Henry Wade.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 385 F.3d 846 (5th Cir. 2004). App. at 1-12. The opinion of the district court is found at 2003 U.S. Dist. LEXIS 12986, 2003 WL 21448388 (N.D. Tex., June 19, 2003). App. at 17-25.

JURISDICTION

The revised judgment of the court of appeals was entered on September 17, 2004. A timely petition for rehearing en banc was denied on October 18, 2004. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The relevant constitutional provisions, statutes, and rules involved in this case are set forth at App. at 28-29. The most important rule is FED. R. CIV. P. 60(b) which states in relevant part:

Rule 60. Relief from Judgment or Order

> (b) . . . On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, . . . for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

This case involves a judgment, originally decided by a three-judge District Court in the Northern District of Texas under federal question jurisdiction, 28 U.S.C. § 1331. On June 17, 1970, the lower court declared the Texas abortion laws unconstitutional.[1] On January 22, 1973, the Supreme Court of the United States affirmed.[2]

On June 17, 2003, Norma McCorvey (hereinafter "Petitioner" or "McCorvey"), the original party known as

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[1] *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970).

[2] *Roe v. Wade*, 410 U.S. 113 (1973) (hereinafter "Roe").

"Jane Roe" in *Roe v. Wade*, filed a Rule 60 Motion for Relief from Judgment (hereinafter "Rule 60 Motion" or "Motion"), App. at 163-188, based on changed conditions relying on this Court's decision in *Agostini v. Felton*.[3] The Rule 60 Motion requested a three-judge court, an evidentiary hearing, and oral argument. App. at 163-188. It provided case law and authorities for its Motion and included 5,347 pages of sworn evidence including affidavits from: Petitioner McCorvey; over 1,000 post-abortive women; scientific and medical experts; and, former abortion clinic personnel. (R. vol. 1, 0003 et seq.).

Only two days later, on June 19, 2003, the district court denied the Rule 60 Motion as untimely stating that thirty years after *Roe* was too long. (App. at 17-25). The district court also denied the request for a three-judge court and an evidentiary hearing. (App. at 17-25). On July 3, 2003, Petitioner filed a timely Motion for Reconsideration. (App. at 213-243). The district court denied that Motion two days later on the same grounds. (App. at 13-16).

An appeal was timely filed with the United States Court of Appeals for the Fifth Circuit. McCorvey argued that the district court abused its discretion because: (a) it ignored the Court of Appeals' recent directive in *Collins v. Morgan Stanley Dean Witter*[4] mandating proper and careful consideration of Rule 60 motions; (b) the Motion should have been granted because it was timely, her evidence was legally sufficient and compelling, and procedural requirements had been met; (c) in the alternative, an evidentiary hearing should have been held; and, (d) the district court lacked jurisdiction to enter an order denying a three-judge court.

On September 14, 2004, the panel of Judges Jones, Wiener, and Prado dismissed the appeal and held that (a)

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[3] 521 U.S. 203 (1997) (hereinafter *Agostini*).

[4] 224 F.3d 496 (5th Cir. 2000).

although the original action in *Roe* was tried by a three-judge court, the Rule 60(b) Motion was not a matter for a three-judge court;[5] (b) the district court erred in concluding that thirty years was too long; (c) the case was moot even though the district court did not address that issue;[6] and, (d) the district court did not abuse its discretion in denying an evidentiary hearing.[7] The court held the Motion was moot because the Texas statutes criminalizing abortion had been repealed by implication.[8] Because repeal by implication had not been raised before, Petitioner filed for rehearing en banc addressing the mootness issue arguing the Texas abortion statutes were not repealed either expressly or by implication.[9] The court denied the petition for rehearing en banc on October 18, 2004, without opinion.[10]

INTRODUCTION

This case involves questions of exceptional national importance that can only be decided by this Court. It squarely presents to this Court the question of whether prospective application of *Roe v. Wade* remains just and equitable given the changed factual and legal conditions surrounding abortions since 1973, and it goes to the heart of the balance that was struck in *Roe*. Only this Court can decide this question, for *Roe* itself effectively foreclosed any other branch of federal or state government, and even lower courts, from addressing the substantial scientific and medical evidence that abortion hurts women.

Petitioner McCorvey, the original plaintiff in *Roe v. Wade,* seeks relief from judgment under Rule 60(b) of the

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[5] Panel Opinion, App. at 3.

[6] Panel Opinion, App. at 6, n.4.

[7] Panel Opinion, App. at 7.

[8] Panel Opinion, App. at 5-6.

[9] The Petition for Rehearing En Banc solely and completely addresses the mootness issue and is reproduced in full in the Appendix, App. at 244-269.

[10] Order Denying Rehearing En Banc (October 18, 2004). App. at 26-27.

Federal Rules of Civil Procedure on the grounds it is no longer just. Rule 60(b) allows the Court to consider whether a prior decision remains "equitable" or "just" in light of changed factual and/or legal conditions. There have been substantial changes in *both* the factual and legal conditions. This case thus provides the Court with its first opportunity to review *Roe* in light of over thirty years of experience with legalized abortion and its effect on women. The substantial body of evidence proves prospective application of *Roe* is unjust. The Court should grant Petitioner a writ of certiorari and take this question of great national importance.

REASONS FOR GRANTING CERTIORARI

I. WHEN AN IMPORTANT AREA OF SOCIAL RESPONSIBILITY IS CONSTITUTIONALIZED, AFFECTING THE HEALTH OF MILLIONS OF WOMEN AND EFFECTIVELY WITHDRAWING IT FROM THE LEGISLATIVE ARENA AND LOWER COURTS, THIS COURT HAS A SPECIAL DUTY TO MONITOR SUBSTANTIALLY CHANGED CONDITIONS TO ENSURE JUSTICE AND PROTECT WOMEN'S HEALTH.

The Court essentially removed the regulation of the practice of abortion from the legislative and political process; therefore, the Court is the only entity that can truly consider the factual and legal changes concerning abortion since 1973.[11] After reviewing McCorvey's legally sufficient and compelling evidence consisting of 5,347 pages of affidavits of post-abortive women, medical and psychological experts, and former abortion clinic personnel, Judge Edith Jones in her concurring opinion expressed her fervent hope that this Court would acknowledge the developments and re-evaluate *Roe*.[12] Judge Jones based her hope on the evidence which she summarized as follows:

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[11] Panel Opinion, App. at 12 (Jones, J., concurring).

[12] *Id.* "One may fervently hope that the Court will someday acknowledge such developments and re-evaluate *Roe* and *Casey*

(Continued on following page)

McCorvey presented evidence that goes to the heart of the balance *Roe* struck between the choice of a mother and the life of her unborn child. First, there are about one thousand affidavits of women who have had abortions and claimed to have suffered long term emotional damage and impaired relationships from their decisions. Studies by scientists, offered by McCorvey, suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions. Second, *Roe*'s assumption that the decision to abort a baby will be made in close consultation with a woman's private physician is called into question by affidavits from workers at abortion clinics, where most abortions are now performed. According to the affidavits, women are often herded through their procedures with little or no medical or emotional counseling. Third, McCorvey contends that the sociological landscape surrounding unwed motherhood has changed dramatically since *Roe* was decided. No longer does the unwed mother face social ostracism, and government programs offer medical care, social services, and even, through "Baby Moses" laws in over three-quarters of the states, the option of leaving a newborn directly in the care of the state until it can be adopted. Finally, neonatal and medical science, summarized by McCorvey, now graphically portrays, as science was unable to do 31 years ago, how a baby develops sensitivity to external stimuli and to pain much earlier than was then believed. In sum, if courts were to delve into the facts underlying *Roe*'s balancing scheme with present-day knowledge, they might conclude that the woman's

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accordingly. That the Court's constitutional decision making leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer. . . ." *Id.*

> "choice" is far more risky and less beneficial, and the child's sentience far more advanced, than the *Roe* Court knew.[13]

Judge Jones discusses the "perverse result"[14] that an issue that affects millions of women and unborn babies cannot be heard or effectively debated:

> At the same time, because the Court's rulings have rendered basic abortion policy beyond the power of our legislative bodies, the arms of representative government may not meaningfully debate McCorvey's evidence. The perverse result of the Court's having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter . . .[15]

The sheer impact and importance of *Roe* on women, and its immense effect on the Nation, warranted at a minimum an evidentiary hearing to examine the changes in the factual and legal conditions since 1973. The evidence of this impact is widespread and undeniable as Justice Sandra Day O'Connor has noted:

> Abortion is still hotly debated in all political arenas. No one, it seems, considers the Supreme Court decision in *Roe v. Wade* to have settled the issue for all time. Such intense debate by citizens is as it should be. A nation that docilely and unthinkingly approved every Supreme Court decision as infallible and immutable would, I believe, have severely disappointed our founders.[16]

Justice Ruth Bader Ginsburg has commented that *Roe*'s "Heavy-handed judicial intervention was difficult to

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[13] Panel Opinion, App. at 8-11 (Jones, J., concurring) (extensive footnotes discussing scientific studies).

[14] *Id.* at 12.

[15] *Id.*

[16] Sandra Day O'Connor, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 45 (Random House 2003).

justify and appears to have provoked, not resolved conflict."[17] Justices have publicly criticized *Roe*.[18]

Like the Court in *Roe*, Petitioner McCorvey thought that abortion would help her.[19] She was not told about any consequences. She placed the *Roe* baby for adoption and never had an abortion. Subsequently, she worked in several abortion clinics and saw abortion first-hand – the crying women, baby parts, inadequate counseling, the lack of informed consent and no real doctor-patient relationship.[20] She came to understand through her first-hand experience, as well as from the testimony of women who had experienced abortion, that abortion hurts women. The reality of abortion practice can change the mind of anyone willing to look at the evidence, as it did for McCorvey. "From time to time – with due solemnity, and after much searching of conscience – the Supreme Court has overruled its own decisions."[21]

Thirty-two years later, this Court now has information that was not available in 1973. Petitioner outlined in her Rule 60 Motion the significantly changed factual and legal conditions. App. at 163-188. What this Court did not know in 1973 is now knowable through advances in medicine, science, and technology. Although this Court believed it was helping women, the real life experiences of women over the last thirty years now demonstrate that abortion hurts women.

By constitutionalizing the right to abortion in *Roe*, state legislatures and lower courts cannot decide the issue. The

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[17] Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385-86 (1985).

[18] Chief Justice Rehnquist, concurring in part and dissenting in part, joined by Justices White, Scalia, and Thomas stated: "We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases." *Planned Parenthood v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

[19] Affidavit of Norma McCorvey, App. at 31.

[20] Affidavit of Norma McCorvey, App. at 37-41.

[21] Anthony Lewis, GIDEON'S TRUMPET 10 (Random House 1964).

Supreme Court has frozen the law based on obsolete 1973 assumptions and prevented the normal regulation of the practice of medicine.[22] This Court now stands as the sole legal entity responsible for protecting women and children from the harm of abortion, which the evidence shows is occurring daily on a vast scale, and therefore, justice requires review of its decision in *Roe v. Wade*.

II. THE FACTUAL AND LEGAL CONDITIONS UNDERLYING *ROE* HAVE MATERIALLY AND SUBSTANTIALLY CHANGED SINCE 1973, AND THEREBY RENDER PROSPECTIVE APPLICATION OF *ROE* UNJUST.

A. Relief from Judgment Is Appropriate If There Has Been a Significant Change in Either Factual or Legal Conditions.

It is appropriate to grant a Rule 60(b) Motion when the party seeking relief can show "'a significant change either in factual conditions or in law.' A court may recognize subsequent changes in either statutory or decisional law."[23] Both need not be proven. This is especially true where changed circumstances have turned the law into an "instrument of wrong."[24] There have been significant changes in both factual circumstances and law since the original judgment in *Roe*. In the Record, which has already been filed with the Clerk,[25] there is legally sufficient and

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[22] For example, a woman may not legally choose to use heroin in the United States, nor may she use Laetrile treatments for cancer, nor may she engage in prostitution, even though all of these involve a liberty interest in her own body. Legislatures are free to act in these areas based on changing social, factual, and legal conditions.

[23] *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (*citing Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) and *Railway Employees v. Wright*, 364 U.S. 642 (1961)).

[24] *Railway Employees v. Wright*, 364 U.S. 642, 647 (1961).

[25] A Rule 32 filing letter was used due to the extensive nature of the evidence required to document changed factual conditions, which is too voluminous to attach here. The Rule 32 filing letter summarizes the most important evidence. App. at 189-212.

substantial evidence of changed factual and legal conditions, which establishes that *Roe* has become an "instrument of wrong" because it results in injuries to many innocent victims.[26] Accordingly, it is no longer just or equitable to give *Roe* prospective application.

Application of the doctrine of *stare decisis* does not lead to a contrary result. *Stare decisis* is at its weakest when interpreting the Constitution because such "interpretation can be altered only by constitutional amendment or by overruling our [the Court's] prior decisions."[27] In constitutional cases, "correction through legislative action is practically impossible,"[28] thus leading to what Judge Jones called the "perverse results" of this case.[29]

Petitioner's evidence met the established legal standard in *Agostini v. Felton,*[30] the lead case applying Rule 60 to a prior decision of this Court. Both lower courts completely ignored *Agostini*. In *Agostini,* this Court held that it had sole jurisdiction and authority to overrule its prior twelve-year-old ruling when considering a Rule 60(b) motion as well as the authority to overrule a companion case.[31] Based on *Agostini,* the threshold issue is "whether the factual or legal landscape has changed since . . . [the prior ruling of the Court]."[32]

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[26] *See Railway Employees v. Wright*, 364 U.S. 642, 647 (1961).

[27] *Agostini v. Felton* 521 U.S. 203, 235 (1997).

[28] *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

[29] Panel Opinion, App. at 12, (Jones, J., concurring).

[30] 521 U.S. 203, 235 (1997).

[31] *Agostini v. Felton*, 521 U.S. 203 (1997). Petitioner McCorvey also filed Sandra Cano's Affidavit, the "Doe" of *Doe v. Bolton*, *Roe*'s companion case, supporting reversal. (R. at 1411 – 1421) (hereinafter R. cites to evidence generally refer to the bates stamp number on the original 5,347 pages of evidence attached to Petitioner's Motion. This is the easiest method of finding the document).

[32] *Id.* at 216.

B. There Have Been Significant Changes in the Factual Conditions Underlying *Roe* Since 1973, Including Evidence of Psychological and Physical Harm to Women.

Petitioner's substantial evidence outlined the changed factual conditions regarding the physical and psychological consequences of abortion to women. Abortion was illegal in most states and relatively rare in 1973.[33] No evidence existed then regarding how widespread, legalized abortion would actually affect women. The Court assumed that abortion would be good for women and made many other non-evidence-based assumptions. The Court assumed abortion was like other medical procedures and as safe as childbirth because the long-term effects of abortion on women were unknown at the time.[34] Based on the little evidence before it, a single affidavit from Petitioner, the Court knew that unwanted pregnancies could put severe pressure on women and that women needed help and compassion in such situations.[35] The Court, however, had no evidence or experience on whether abortion would in fact help or hurt women in the long run. The evidence from post-abortive women now shows abortion is a short-term "solution" with long-term negative consequences.[36]

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[33] *Roe v. Wade*, 410 U.S. 113, 118, n.2 (1973).

[34] *Id.* at 149-50.

[35] *Id.* at 153.

[36] *See, e.g.*, Scherrie, "Twenty-five years later, I still cannot talk about it without tears and pain in my heart. It all looks simple on paper and seems like an easy way out of a bad spot, but no one tells you that the easy way out will cost you later in emotional damage and physical problems." (R. 1200). Nora, "It never goes away and you will always think of what could have been and the anger of how the government allows this hideous procedure." (R. 304). L.M.C., "[I]t hurts women physically and emotionally! That it does not end when you leave the clinic." (R. 295). Dianne, "I didn't know that the hurt would never go away." (R. 376). *See also* App. at 53, 56, 68, 75-76, 81, and 115 (hereinafter, references to Women's Affidavits not in the Appendix use R. and the bate stamp number attached to the original Rule 60 Motion, which is the easiest way to find individual affidavits that are not in the Appendix).

Abortion has negative psychological effects on women.[37] *Casey* placed abortion in the range of choices that are "central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[38] However, the Court of Appeals for the Fifth Circuit recently cited testimony that abortion as practiced is "almost always a negative experience for the patient. . . ."[39] In *Bell*, the Court of Appeals struck down Texas abortion facility regulations that required Texas abortions to be done in a manner that enhanced women's "self-esteem" and "dignity."[40] Contrary to the non-evidence-based assumption in *Casey*, the decision in *Bell* and the Women's Affidavits totally refute the assumption that abortion enhances female dignity, self-esteem, and autonomy.[41]

As Petitioner McCorvey's Affidavit and the Affidavits of more than 1,000 women who have experienced abortion now show, a vast gulf exists between theoretically supporting an abortion and experiencing one. These more than 1,000 Affidavits constitute the largest body of direct, sworn evidence in the world on the adverse effects of abortion on women.[42] Ironically, the abortion itself often causes a destructive cycle which may lead to more abortions.[43]

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[37] *See, e.g.,* Nicole, "Abortion is so devastating that I would never do it again – even at the cost of my own life." App. at 70.

[38] *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

[39] *Women's Medical Center v. Bell*, 248 F.3d 411, 418 (5th Cir. 2001).

[40] *Id.*

[41] For example, Camelia, "I have suffered with low self-esteem, self-hatred, suicidal impulses, constant anxiety (especially about sex and about making decisions). . . ." App. at 120. A.C.N., "My abortion took away my sense of self worth and self confidence." App. at 124.

[42] R. 15-1410, hereinafter referred to as "Women's Affidavits." For example, *see* Victoria, "All they would need to see is the pain, sorrow and grief that I carry with me for the rest of my life." (R. 763). Debra, "While I was still under the effects of the sedation, but after the procedure was completed, I began loud, uncontrollable sobbing . . . I can honestly say this was and is the lowest day of my life." (R. 1202).

[43] *See, e.g.*, S.M.P., "I immediately gained lots of weight and drank . . . I felt it poisoned everything I thought, felt or did." (R. 1016). *See generally* Affidavit of Dr. Burke (R. 1422-1667).

Women are overwhelmed with the guilt and depression of abortion for years after having an abortion.[44] In the Women's Affidavits, post-abortive women were asked: "How has your abortion affected you?" The women's responses show the Court the devastation caused by their abortions.[45] Excerpts from one hundred Women's Affidavits are included for the Court's general review in the Appendix. App. at 43-162. All of the more than 1,000 Women's Affidavits were filed with the Clerk of the Supreme Court under Rule 32 and are in the Record at R. 15-1410.

The Affidavit of Dr. David Reardon, one of the world's leading experts on the effects of abortion on women, and the Affidavit of Dr. Theresa Burke, a clinical psychotherapist who has counseled hundreds of post-abortive women, further demonstrate the devastating psychological consequences of abortion.[46]

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[44] *See* Brandy, "No one told me that I would hear cries in the middle of the night." (R. 1251). Beverly, "It's not a quick and easy solution. Don't do it! It will haunt you the rest of your life." App. at 84. *See generally,* the Women's Affidavits (R. 15-1410); the Affidavit of Theresa Burke, Ph.D. (R. 1422-1667); the Affidavit of David Reardon, Ph.D. (R. 1668-1804), Exhibits to Affidavit of David Reardon, Ph.D. (R. 1805-4307); the Client Intake Records From Pregnancy Care Centers (R. 4308-5188); the Affidavit of Carol Everett, former abortion provider (R. 5189-5196). *See also* App. at 45, 46, and 47.

[45] For example, Amy Marie, "It devastated me. I had nightmares, flashbacks, fits of rage, uncontrollable crying, trouble sleeping, and could not look at pregnant women or children without feeling hurt, anger, and guilt." (R. 1159).

[46] *See* the Affidavit of David Reardon, Ph.D., filed with the Clerk of the Court under Rule 32, R. 1668-1804, Exhibits to Affidavit of David Reardon, Ph.D. (R. 1805-4307) (citing over 300 medical and scientific articles or studies, Dr. Reardon stated: "Newly found research has discovered that women who abort, compared with women who carry their pregnancy to term, are more likely to require psychiatric care, to suffer from anxiety, sleep disorders, sexual dysfunction, eating disorders, promiscuity, depression, and other negative emotions, which can cause behavioral problems in the children born to them subsequently. They are more likely to remain on Medicaid longer, to have more subsequent health care claims, and to have more subsequent pregnancies and miscarriages. In addition, aborting women are more likely to

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Abortion has also had negative physical effects on women. As the Women's Affidavits and the scientific evidence demonstrate, there are many physical complications that can result from abortion.[47] These complications include, but are not limited to: increased bleeding in subsequent pregnancies, infertility, miscarriages, ectopic pregnancy, prematurity, endometriosis, pelvic inflammatory disease, uterine perforations, genital tract infection, placenta previa, and retention of placenta.[48] These complications are not only hazardous to the immediate well being of the mother, but they can also have lasting effects on her health and the health of her subsequent children.

In addition, suicide is one of the effects of abortion.[49] The suicide rate for women who have had an abortion is significantly higher than for those who carry their pregnancies to

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commit suicide, abuse drugs or alcohol, and have higher rates of divorce.) (footnotes omitted); the Affidavit of Theresa Burke, Ph.D. (R. 1422-1667). The Rule 32 filing letter with a Summary of the Evidence is in App. at 189-212. *See, e.g.*, Julie, "One month later I had a nervous breakdown . . . " App. at 155; Beth, "I was suicidal; full of guilt and shame. Suffered from fear and depression. Caused marital and relational problems, crying spells, anxiety, panic attacks, sleep disturbances. Suffered most on anniversary of abortion." App. at 149. *See also* App. at 58, 64, "torment", App. at 68, among many others.

[47] Complications from all types of abortions, as described in the GALE ENCYCLOPEDIA OF MEDICINE, include "uncontrolled bleeding, infection, blood clots accumulating in the uterus, a tear in the cervix or uterus, missed abortion where the pregnancy continues, and incomplete abortion where some material from the pregnancy remains in the uterus."

[48] *See* Summary Affidavit of David Reardon, Ph.D. (R. 162 of the Court's Record numbers, attached to Motion for Reconsideration), Affidavit of David Reardon, Ph.D. (R. 1668-1804), Exhibits to Affidavit of David Reardon, Ph.D. (R. 1805-4307); *see also* the Women's Affidavits (R. 15-1410).

[49] For example, Kathy, "I would tell them about the hell I went through. About hearing babies cry when none were around, being suicidal, an alcoholic." (R. 530). Women specifically testified of suicidal thoughts at App. at 65, 71, 92, 107, 109, 115, 120, 149, 151, 153, and 161, among many others.

term.[50] Abortion can lead to depression and anxiety and other mental disorders. To deal with this, many women turn to suicide. As a result of the shame and guilt, many women feel they do not deserve to live, as the Women's Affidavits repeatedly demonstrate. The felt shame often prevents them from seeking help. The resulting feeling of isolation leads to severe depression and a search for a way out, such as suicide.[51] There is compelling scientific and medical evidence since 1973 that clearly demonstrates that human life begins at conception,[52] and therefore, many women express great remorse over the "murder" of their own child.[53] This evidence was presented in the Record and could have been more thoroughly presented at the evidentiary hearing which was denied.

In sum, the Court may come to believe, after reviewing the evidence, that abortion creates problems more closely related to the Court's concerns about assisted suicide than the ideal situation assumed in *Roe* and *Casey*. As in *Glucksberg*,[54] abortion and assisted suicide may have a certain appeal in hard cases, but knowledge of the reality helps remove the illusory luster, especially when multiplied by millions. In theory, abortion is supposed to be free and voluntary, but like assisted suicide, the "knowing and responsible mind is harder to assess,"[55] than one would anticipate. Additionally, "there is no reason to think the democratic process will not strike the proper balance

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[50] *See* Affidavit of David Reardon, Ph.D. (R.1668-1804), Exhibits to Affidavit of David Reardon, Ph.D. (R. 1805-4307).

[51] *See* the Women's Affidavits, R. 15-1410; the Affidavit of Dr. Theresa Burke, R. 1422-1667; the Affidavit of David Reardon, Ph.D., R. 1668-1804, Exhibits to Affidavit of David Reardon, Ph.D., R. 1805-4307.

[52] *See* Scientific and Medical Analysis R. 5197-5347.

[53] For example, Wilma, "[y]ou feel like you have committed murder." App. at 52 and R. 000133. For further references by women to murder *see* App. at 43, 60, 72, 74, 75, 86, 94, 103, 106, 108, 116, 118, 125, and 129, among many others.

[54] *Washington v. Glucksberg*, 521 U.S. 702 (1997).

[55] *Id.* at 784 (Souter, J., concurring).

between the interests of terminally ill [here, pregnant women], . . . and the state's interest in protecting those who might seek to end life mistakenly or under pressure,"[56] as is all too often the case with women in unwanted pregnancies.

C. There Have Been Significant Changes in Legal Conditions Underlying *Roe* Since 1973, Including Changes in the Law of Federalism, and "Baby Moses" Laws in Forty-Six States Which Shift the Burden of Unwanted Child Care from Women to Society.

In recent years, there have been significant changes in the law of federalism, which could justify returning to the states the decision whether to allow or prohibit abortion. Before *Roe* federalized abortion, health and safety issues and specifically abortion were traditional state and local concerns.[57] Beginning in 1995 with *United States v. Lopez*,[58] there has been a renewed emphasis on the judicial enforcement of the boundary lines of federalism.[59] While the Court has focused on Congress in *Lopez* and its progeny, the doctrine of federalism applies to the dangers of overreaching national power among all branches of government. In fact, "the danger to federalism may be greater from the federal courts than from Congress simply because judicial intervention is anti-democratic" such that "the states have relatively little recourse."[60] The common thread

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[56] *Id.* at 737 (O'Connor, J., concurring, joined by Ginsburg, J.) (further analogies to assisted suicide were developed in the Motion and the full Record).

[57] *Roe*, 410 U.S. at 139-140 n.34-37; *see also Webster v. Reproductive Health Services*, 492 U.S. 490, 520 (1989) (commenting that *Roe*'s framework pertained to "areas of medical practice traditionally subject to state regulation").

[58] *United States v. Lopez*, 514 U.S. 549 (1995).

[59] *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1995); *United States v. Lopez*, 514 U.S. 549 (1995).

[60] J. Harvie Wilkinson III, *The 2000 Justice Lester W. Roth Lecture: Federalism for the Future*, 74 S. CAL. L. REV. 523, 536 (2001).

among the line of federalism cases involves the Court's restriction of expansion of national power into traditional state law matters such as education, crime, family law and health issues, where abortion clearly falls. *Roe* is contrary to this line of cases arising after *Casey* and therefore has made *Roe* "obsolete."[61] The Court's application of *Lopez* federalism to *Roe* could not only properly return this traditional state law matter to the states, but it could also restore the democratic processes to this issue of great controversy, which has not been resolved as *Casey* hoped.[62]

In addition, there have been significant changes in the statutory law since *Roe*. Forty-six states are now willing to completely relieve the burden of childcare for "unwanted children" for all women. For example, in Texas, a woman can now simply leave an "unwanted" child at a hospital, clinic or emergency room within sixty days of birth with no questions asked and no threat of criminal prosecution.[63] Because of this new law, there is no longer a need to seek an abortion to avoid any "unwanted" burdens of motherhood. The effect is that Texas will help the mother and is willing to assume the responsibilities, financial and otherwise, of raising the child.

Since 1999 when Texas pioneered this legislation, forty-five other states have enacted similar legislation called "Baby Moses" or "safe haven" laws.[64] In addition,

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[61] In 1992, before the new Federalism decisions, the Court held: "No development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking." *Casey*, 505 U.S. at 857.

[62] The Court unsuccessfully "call[ed] the contending sides to end their national division . . . " *Casey*, 505 U.S. at 867.

[63] TEX. FAM. CODE ANN. §§ 262.301-262.303, and § 262.105; TEX. PENAL CODE § 22.041(h).

[64] *See* ALA. CODE § 26-25-1 et seq. (2000); ARIZ. REV. STAT. § 13-3623.01 (2001); ARK. CODE ANN. § 9-34-202 (Michie 2001); CAL. HEALTH & SAFETY CODE § 1255.7 (Deering 2000); COLO. REV. STAT. § 19-3-304.5 (2000); CONN. GEN. STAT. § 17a-57 et seq. (2000); DEL. CODE ANN. tit. 16 § 907A (2001); FLA. STAT. ANN. § 383.50 et seq. (West 2000); GA. CODE ANN. § 19-10A-1 et seq. (2002); IDAHO CODE § 39-8201 et seq. (2001); § 383.50 ILL. COMP. STAT.

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Texas, along with other states, will pay for medical expenses associated with pregnancy for the needy. In *Roe,* this Court was concerned with imposing upon the mother "a distressful life and future . . . associated with the unwanted child."[65] Now, the mother can choose to be free of the burdens or blessings of raising a child without killing the child and without the subsequent damage to herself.

Similarly in *Casey,* this Court stated: "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."[66] A woman's "destiny" can still be shaped by her own conception of her place in society because she can separate herself from

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2/1 et seq. (West 2001); IND. CODE ANN. § 31-34-2.5-1 et seq. (Michie 2000); IOWA CODE § 233.1 et seq. (2001); KAN. STAT. ANN. § 38-15,000 (2000); KY. REV. STAT. ANN. § 405.075 (Michie 2002); LA. CH. CODE art. 1701 et seq. (West 2000); ME. REV. STAT. ANN. tit. 17-A § 553 (West 2002); MD. CODE ANN. CTS. & JUD. PROC. § 5-641 (2002); MASS. GEN. LAWS ch. 119, § 391/2 (2004); MICH. COMP. LAWS § 750.135 (2000); MINN. STAT. § 145.902 (2000); MISS. CODE ANN. § 43-15-201 et seq. (2001); MO. REV. STAT. § 210.950 (2002); MONT. CODE ANN. § 40-6-401 et seq. (2001); NEV. REV. STAT. § 432B (2001); N.H. REV. STAT. ANN. § 132-A et seq. (2003); N.J. STAT. ANN. § 30:4C-15.5 et seq. (West 2000); N.M. STAT. ANN. §§ 24-22-2 et seq. and 30-6-1 (Michie 2001); N.Y. PENAL § 260.03; PENAL § 260.15; and, SOC. SERV. § 372-g (2000); N.C. GEN. STAT. § 7B-500 (2001); N.D. CENT. CODE § 50-25.1-15 (2001); OHIO REV. CODE ANN. § 2151.3515 et seq. (Anderson 2001); OKLA STAT. tit. 10 § 7115.1 (2001); OR. REV. STAT. § 418.017 (2001); PA. STAT. ANN. tit. 23 § 6501 et seq. (West 2002); R.I. GEN. LAWS § 23-13.1-1 et seq. (2001); S.C. CODE ANN. § 20-7-85 (Law. Co-op. 2000); S.D. CODIFIED LAWS § 25-5A-27 et seq. (Michie 2001); TENN. CODE ANN. § 68-11-255 (2001); TEX. FAM. CODE ANN. § 262.301 et seq. (West 1999); UTAH CODE ANN. § 62A-4a-801 et seq. (2001); VA. CODE ANN. § 18.2-371.1 (Michie 2003); WASH. REV. CODE § 13.34.260 (2002); W. VA. CODE § 49-6E-1 et seq. (2000); WIS. STAT. ANN. § 49.192 (West 2001); WYO. STAT. ANN. § 14-11-101 et seq. (Michie 2003).

[65] This Court stated that "... a distressful life and future ... Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it." *Roe*, 410 U.S. at 153.

[66] *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).

the child if he or she is still "unwanted" at birth, and for sixty days thereafter. She has the liberty to separate herself from the child without the guilt and shame that comes from the intentional killing of her child.[67] If her circumstances improve over time, she is free to reunite with her child, if she so desires, and the child has not yet been adopted. Her decision that she cannot care for the child is reversible, not irrevocable as with abortion. Her range of destiny shaping choices has expanded and her liberty is now greater.

In sum, if *Roe* were vacated, some states would allow abortion and some states would restrict abortions to some degree. This would more accurately reflect the democratic diversity of America, yet women would not be without alternatives.

D. The Underlying Assumptions in *Roe* and *Casey* Have Proven Unworkable in Practice.

Casey recognized that one of the reasons a case should be overruled is if it proves to be unworkable in practice.[68] The changed factual conditions go to the heart of *Roe*'s assumptions and support McCorvey's Rule 60 Motion because the judicial assumptions are not the reality of abortion practice today.

1. Abortion Practice Usually Does Not Involve a Normal Doctor-Patient Relationship Nor a Voluntary, Informed Private Decision Between a Woman and Her Doctor.

The real life experiences of the women who have had abortions and the individuals who have worked in abortion

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[67] *See, e.g.*, Shawn, " . . . constant (almost daily) thought about the tragic manner in which my baby was killed, and extreme guilt." App. at 77. *See also* App. at 82, 85, 89, 97, 106, 108, and 112, among many others.

[68] *Casey*, 505 U.S. at 854.

clinics since 1973 show that there is not usually a normal doctor-patient relationship and that the abortion industry does not adequately protect women.[69] As the Women's Affidavits demonstrate, most women never see their abortionist until the procedure is being performed.

At the heart of *Roe* is the assumption that the abortion decision should be between a woman and her doctor.[70] The sworn testimony of post-abortive women and personnel in abortion clinics shows that the abortion industry fails to (1) adequately provide women with the protections of a true doctor-patient relationship; (2) provide women with the information necessary to truly make an informed decision regarding the procedure; (3) maintain the normal standards of health, safety, and professionalism required of medical personnel; (4) protect the mental and physical safety of women; (5) fully and fairly inform patients about the nature of the abortion procedure, that it is a baby and not just a mass of cells, or at least, that they may come to believe it is a baby, and the consequences of having an abortion; and, (6) regularly misleads or deceives women regarding the nature and development of their unborn children.[71]

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[69] For example, M.E.A., "I was never told that I could be, and was in labor for 18 hours, delivered baby with no one present. Nurse came in room with doctor, umbilical cord was cut, baby placed in bucket on food tray cart in my room." (R. 017). Linda, "This is the horror of our generation – I believe that this abuse to women needs to be outlawed." (R. 384). *See, e.g.*, Motion, paragraph 26, App. at 181 and Affidavit of Norma McCorvey, App. at 31-42; Affidavits of more than one thousand Post-Abortive Women (R. 15-1410); Affidavit of Theresa Burke, Ph.D. (R. 1422-1667); Affidavit of David Reardon, Ph.D. (R. 1805-4307); Client Intake Records for Pregnancy Care Centers (R. 4308-5188); Affidavit of Carol Everett, former abortion provider (R. 5189-5196).

[70] "All these are factors the woman and her responsible physician necessarily will consider in consultation." *Roe*, 410 U.S. at 153.

[71] Women were also asked, "Were you adequately informed of the nature of abortion?" Typical responses demonstrate that they were not. *See, e.g.*, Paula, "I was not told about the years of emotional torment I would experience." (R. 84). Tina, "No, I was not told anything about abortion. . . . No one told me of the risks I was taking." (R. 159). *See also* Affidavit of Norma McCorvey, App. at 31-42; the Affidavits of more than 1,000

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2. Abortion Is Often the Result of Coercion from Relatives, Sexual Partners, or Circumstances.

Roe is not workable because of other practical flaws that go to the heart of the liberty interest. For example, women are frequently coerced. The Supreme Court in *Roe* and *Casey* assumed that abortion would be a voluntary choice. Rather than being the result of a knowing, voluntary, dignity-enhancing woman's choice, the Women's Affidavits reveal that abortion is almost always the result of pressure or coercion from sexual partners, family members, abortion clinic workers or abortionists, or circumstances.[72] Many women testify that they would have never considered an abortion, if it were not legal. The "abortion choice" gave freedom to others to pressure them into something they did not want and later deeply regretted.[73]

3. Women Are Left Alone to Deal with the Problem of Perceived Guilt.

In addition, there is no true liberty for women because guilt is another consequence of abortion. There are three

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Post-Abortive Women (R. 15-1410); the Affidavit of Theresa Burke, Ph.D. (R. 1422-1667); the Affidavit of David Reardon, Ph.D. (R. 1668-1804), Exhibits to Affidavit of David Reardon, Ph.D. (R. 1805-4307); the Client Intake Records From Pregnancy Care Centers (R. 4308-5188); the Affidavit of Carol Everett, former abortion clinic worker (R. 5189-5196). Women were also asked: "Were you adequately informed of the consequences of abortion?" Typical responses demonstrate that they were not. *See, e.g.*, R. 27, 35, 37, 58, 88, 102, 125, and 133 among many others.

[72] Women's Affidavits show pressure or coercion when asked, "Did anyone pressure you into having an abortion? *See, e.g.*, Jennifer, "Yes, my family and the counselor at the clinic." (R. 584). Janet, "Yes. Mostly my parents but also my then boyfriend." (R. 641). Cori Elizabeth, "Yes, my fiancé at the time." (R. 780). *See also* R. 315, 328, 373, 393, and 410 among many others.

[73] For example, Janice, "Because of the fear I lived under perpetrated by my ex-husband, I chose to have the abortion to avoid any more of his wrath and terror . . . it has affected me emotionally to this day." App. at 83.

typical responses to guilt: punishment, even self-punishment, forgiveness, and denial. Denial is a psychological coping mechanism, which can be effective in the short-run, but eventually leads to problems.[74] Whatever the legal status of the "fetus," "millions of Americans believe that life begins at conception. . . . "[75] Thus, many women who have abortions feel or will feel guilt about the procedure at some point in their life, often years later. The Supreme Court has never dealt with this perceived guilt issue. The Court cannot assure a woman she has not killed her baby since the Court even today has not "resolve[d] the difficult question of when life begins."[76]

If even a conservative ten percent of women suffer severe psychological injury at some point in their life, then at least 100,000 women a year could suffer needless trauma, especially now that society will care for unwanted children. Petitioner's evidence demonstrates the figure is much, much higher. While the initial reaction to an abortion may be relief for some, though certainly not all, this relief is due to the end of a very tragic, pressure-packed, emotionally-conflicted situation. Merely making the decision sometimes produces some temporary relief, but the evidence now shows the relief is not long-lasting for millions of women. Because of *Roe* and *Casey*, normal social controls and investigations, experiments, and consumer protection cannot occur. If a procedure this Court once thought beneficial is in fact dangerous, this Court should at least look at the evidence, or order a remand for a trial.

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[74] *See* Dr. Burke's Affidavit which "explains some of the human defense mechanisms [post-abortive] women experience in various ways such as suppression, repression, rationalization, reaction formation, introjection, undoing, projection, provocative behavior, displacement, conversion, withdrawal, regression, deflection, and denial." Rule 32 Filing Letter, App. at 206.

[75] *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000); *see also* Women's Affidavits.

[76] *Roe*, 410 U.S. at 159.

III. THE COURTS BELOW ERRED IN DENYING PETITIONER DUE PROCESS AND ABUSED THEIR DISCRETION.

A. Petitioner Has Met All Procedural Requirements.

The courts below erred in denying Petitioner's Rule 60 Motion on procedural grounds, which will result in untold further injuries to women. Petitioner has met all procedural requirements.[77] At the time *Roe* was originally decided, all of the procedural requirements had been met. No independent jurisdiction is needed to support a Rule 60(b) Motion because the district court has continuing jurisdiction.[78] By the plain language of Rule 60(b),[79] Petitioner has standing to bring this Motion because she was a party to the "final judgment, order, or proceeding . . . "[80] The courts have followed this plain reading of the Rule.[81] There is no question that Norma McCorvey was and is a party, and

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[77] Petitioner addressed in her Brief to the Court of Appeals for the Fifth Circuit the procedural issues of standing, mootness, judicial estoppel, *stare decisis*, and binding precedent in greater detail. She continues to assert that all procedural requirements have been met and that no independent jurisdiction is needed to support a Rule 60(b) Motion.

[78] *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755, 762 (6th Cir. 2002) (*quoting* MOORE'S FEDERAL PRACTICE § 60.84[1][a] (3d ed. 1997) that "It has been long established that no independent federal jurisdictional basis is needed to support a Rule 60(b) motion proceeding. A Rule 60(b) motion is considered a continuation of the original proceeding. "If the district court had jurisdiction when the suit was filed, it has jurisdiction to entertain a Rule 60(b) motion. This jurisdiction is not divested by subsequent events.").

[79] FED. R. CIV. P. 60(b) states: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding. . . . "

[80] FED. R. CIV. P 60(b).

[81] *See National Acceptance Co. v. Frigidmeats*, 627 F.2d 764, 766 (7th Cir. 1980). *See generally* 11 Charles Alan Wright, Arthur R. Miller, et al., FEDERAL PRACTICE AND PROCEDURE "Jurisdiction" § 2865 at 225-226 (West 1973) (stating it is well-settled that one who was not a party lacks standing to bring a Rule 60(b) motion).

therefore, she has met all procedural requirements for a Rule 60 Motion.

B. The Rule 60 Motion Was Denied After a Mere Two Days Without Careful Consideration of the 5,347 Pages of Sworn Evidence Submitted with the Motion.

The United States Court of Appeals for the Fifth Circuit has criticized district courts that fail to hold post-judgment hearings and carefully consider each motion on its merits.[82] Recently, the court admonished the lower courts to "*carefully consider each such motion on its merits. . . .*"[83] In the present case, the district court ignored the court of appeal's directive for careful consideration. The district court candidly admitted that it denied "McCorvey's motion for relief from judgment without considering the substance of her criticism of *Roe*." App. at 17-18.

In addition, the district court ruled on this unusual case of national importance in a mere two days without giving careful consideration to 5,347 pages of affidavit evidence. This rapidity does not suggest even the appearance of impartiality and a due regard for justice.

The appellate panel correctly held that the district court erred in denying the Rule 60 Motion based on timeliness. The panel stated: "Essentially, the district court concluded that a 30-year delay, regardless of the circumstances, is too long as a matter of law. We disagree."[84] The panel correctly reasoned that there is not a set period of time but that the motion must be brought within a reasonable time based on the particular facts and circumstances.[85] However, the panel erred in its decision

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[82] *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 494 (5th Cir. 2000).

[83] *Id.* at 502 (emphasis added).

[84] Panel Opinion, App. at 6.

[85] *Id. See* Petitioner's Motion For Reconsideration for detailed timeliness analysis. App. at 213-243. Federal courts have allowed relief decades after judgment under a Rule 60 Motion. *See, e.g., Agostini v. Felton*, 521 U.S. 203 (1997) (12 years); *Rufo v. Inmates of the Suffolk*

(Continued on following page)

on mootness because Texas has consistently banned or restricted abortion to the full extent allowed by the Court.

C. By Ignoring the Clear Intent of Texas Abortion Law to Protect Women and Children to the Full Extent of the Constitution, the Decision Below Constitutes Blatant Federal Court Nullification of State Abortion Law.

In *Leavitt v. Jane L.*,[86] this Court summarily reversed the court of appeals' interpretation of state abortion law, explaining that while the Court normally does not "grant petitions for certiorari solely to review what purports to be an application of state law;" it did so and should do so "where the alternative is allowing blatant federal court nullification of state law."[87] As the Petitioner's mootness argument will show, it is clear even to the leading pro-abortion advocacy group, that Texas would ban abortion except to save the life of the mother if it could.[88] What stops Texas is not its own legislative intent, as the panel below incorrectly opined, but the judgment in *Roe v. Wade* itself. Of course, if this Court gave each state the opportunity to do so, each state could decide to what extent, if at all, they would regulate or ban abortion.

County Jail, 502 U.S. 367 (1992) (10 years); *Railway Employees v. Wright*, 364 U.S. 642 (1961) (12 years); *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755 (6th Cir. 2002) (28 years); *United States v. Board of School Commissioners*, 128 F.3d 507 (7th Cir. 1997) (30 years); *NAACP v. Duval County School*, 273 F.3d 960 (11th Cir. 2001) (41 years).

[86] *Leavitt v. Jane L.*, 518 U.S. 137, 144-145 (1996).

[87] *Id.*

[88] "Given the current composition of the [Texas] legislature and the State's history of regulating abortion heavily, it is likely that Texas would enact a new statute banning abortion." Center for Reproductive Rights, *What If Roe Fell? The State-by-State Consequences of Overturning Roe v. Wade* 78 (Sept. 2004) Attached to supplemental briefing letter with Fifth Circuit. App. at 270-275.

D. The Case Is Not Moot.

The panel held that "because the statutes declared unconstitutional in *Roe* have been repealed, McCorvey's 60(b) motion is moot."[89] McCorvey submits that the Texas abortion statutes have not been repealed expressly or by implication.

After *Roe,* the Penal Code was revised, but the abortion provisions were expressly *not* repealed. The Disposition Table made it clear that certain articles were *unrepealed* even though they were placed into a different part of the new Code.[90] The historical note states they are unconstitutional because of *Roe v. Wade*. Thus, contrary to the Court of Appeals, the Legislature has directly stated that the abortion articles are unrepealed.

In 1974, the Attorney General outlined the types of regulations permitted under *Roe*.[91] He said that "sponsors . . . should be guided by the principles discussed herein. . . . "[92] Subsequently, the Texas Legislature passed legislation restricting abortion as much as possible based on the constitutional limitations of *Roe v. Wade* and the Attorney General's guidelines after the decision.

It is not reasonable to assume that the Legislature would repeal by implication what it expressly refused to

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[89] Panel Opinion, App. at 6. *See also* Petition For Rehearing En Banc for more complete mootness discussion. App. at 244-269.

[90] In fact, the Table was entitled "Disposition of **Unrepealed** Articles of the Texas Penal Code of 1925 and Vernon's Texas Penal Code." (emphasis added) The instructions for that Disposition Table stated the Legislature was giving new official citations of unrepealed articles. The instructions for the Disposition Table stated in relevant part: "Pursuant to the authority granted by Section 5 of Chapter 399, Acts of the 63rd Legislature, the Texas Legislative Council has compiled the following table showing the new official citations of **unrepealed** articles of the 1925 Texas Penal Code and the new classifications of unrepealed statutes compiled as articles of Vernon's Texas Penal Code." (emphasis added)

[91] OP. TEX. ATT'Y GEN. No. H-369 at 4-13 (1974).

[92] *Id.* at 13.

repeal. More logical is the interpretation that the Legislature has followed the guidelines of the Attorney General since 1974 in regulating abortion and providing administrative, civil, and criminal penalties to the full extent of the Supreme Court's new cases interpreting the Constitution.[93] One author criticizing the Fifth Circuit's approach stated: "[T]hey [post-*Roe* statutes] should generally be viewed as measures intended to fill a gap created by *Roe* rather than as impliedly repealing pre-*Roe* legislation."[94]

This Court "weighs in favor of revival."[95] Several state courts have explicitly addressed revival, and with one exception, they have concluded that invalidated statutes are immediately enforceable when the invalidating decision is overturned.[96] Prior to the overruling decision, an invalidated statute "is dormant, but not dead."[97] One court has stated:

> There are comparatively few cases dealing squarely with the question before us, but they are unanimous in holding that a law once declared unconstitutional and later held to be constitutional does not require reenactment by the legislature in order to restore its operative force. They proceed on the principle that a statute declared

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[93] Texas regulates abortion in many ways, as correctly noted below. App. at 5. These provisions show a desire to allow abortions only to the absolute minimum as required by *Roe* and its progeny.

[94] *See generally* Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without Roe: Applying the Doctrine of Implied Repeal to Abortion*, 11 ST. LOUIS U. PUB. L. REV. 385, 402 (1992) (stating overwhelming consensus is that statutes automatically revive).

[95] Treanor & Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1911 (1993); *see also* Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, n.63 (1999) ("an invalidated statute simply becomes dormant, ready to be enforced as soon as a court finds that it is no longer invalid").

[96] Treanor & Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1913-1914 n.50 (citations omitted).

[97] *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952).

> unconstitutional is void in the sense that it is inoperative or unenforceable, but not void in the sense that it is repealed or abolished; that so long as the decision stands the statute is dormant but not dead; and that if the decision is reversed the statute is valid from its first effective date. (citations omitted).[98]

By statute, Texas presumes that the intention of its Legislature is to be in "compliance with the constitutions of this state and the United States . . . "[99] and that "a just and reasonable result is intended."[100] If *Roe* is vacated on the grounds that it is no longer just, the just result would be to revive the dormant Texas law, not penalize Texas for following this Court.

There is no irreconcilable conflict between the older and new statutes. The dormant "pre-*Roe*" statutes allowed abortions to save the life of the mother.[101] If *Roe* is vacated, allowable abortions to save the life of the mother under the "revived" statutes would still be governed by the newer statutes which are silent on the purpose for abortions.[102]

The repeal of a statutory provision by implication will not be declared unless the legislative intent to repeal is so clear and apparent as to leave no room for either doubt or

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[98] *Id.*; *see also* 39 OP. ATT'Y GEN. 22 (1937) (stating unconstitutional statute remains on the "statute books" and is valid from the date it became effective).

[99] TEX. GOV'T CODE § 311.021.

[100] *Id.* § 311.021(3).

[101] Penal Code art. 1196 stating: "Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." TEX. PENAL CODE art. 1196 (1925), App. at 29.

[102] Unlike the statute in *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990), Texas had an exception to save the life of the mother. *Weeks* which was cited by the panel below has been criticized for its flawed analysis. *See generally* Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without Roe: Applying the Doctrine of Implied Repeal to Abortion*, 11 ST. LOUIS U. PUB. L. REV. 385 (1992).

speculation.[103] Here, the Legislature is responding to what the Supreme Court has done, and not to what the Legislature itself has done in prior sessions. This is a significant difference.

There are several exceptions to the mootness doctrine. The panel itself noted an exception to mootness applies "where there is evidence, or a legitimate reason to believe, that the state will reenact the statute or one that is substantially similar."[104] Yet the panel ignored all the subsequent legislation Texas adopted whenever subsequent Supreme Court interpretations allowed restrictions.[105]

Petitioner McCorvey further contends that the case is not moot because it comes within other exceptions to the mootness rule. The first exception is "capable of repetition, yet evading review." This Court specifically addressed this issue in the original *Roe* case.[106] In 1973, McCorvey's case was arguably moot because she was no longer pregnant.[107] This Court rejected the argument stating "pregnancy provides a classic justification for a conclusion of nonmootness" and "capable of repetition, yet evading review."[108] Harm to pregnant women from abortion injuries is similar. Judge Jones and Petitioner believe that unless the Court uses its own *Roe* exception to the mootness doctrine, as it did in this case originally to reach this important social issue, "the Court will never be able to examine its factual assumptions on a record made in Court . . . No 'live'

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[103] *Samaniego v. Arguelles*, 737 S.W.2d 88, 89 (Tex. App. – El Paso 1987); *see also Allen v. Mauro*, 733 S.W.2d 228, 234 (Tex. App. – El Paso 1984).

[104] Panel Opinion, App. at 5, n.3.

[105] *See also* note 88.

[106] *Roe*, 410 U.S. at 125.

[107] *Id.* at 124.

[108] *Id.* at 125.

controversy will arise concerning this framework, consequently I cannot conceive of any judicial forum in which McCorvey's evidence could be aired."[109] Thus, substantial changes in factual and legal conditions would evade review, contrary to *Roe*'s mootness exception previously established in this case. In essence, such a ruling also completely undermines Rule 60.[110]

The second exception to mootness is "voluntary cessation of the challenged practice."[111] The holding in *Roe* is a continuing quasi-injunctive order. In *Roe*, this Court did not grant injunctive relief because the decision would and did have the same effect as an injunction. The Court said "[w]e assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes are unconstitutional."[112] Prosecutors in the State of Texas have since respectfully, and voluntarily, given credence to this Court's decision. Prosecutors could change their mind and prosecute abortionists. The only way to get relief from a quasi-injunctive order is Rule 60 relief, and therefore, McCorvey's Rule 60 Motion is not moot.

The third exception to mootness is collateral consequences.[113] "[I]f there are collateral consequences to one of the parties – even if they are quite minor – the controversy is not moot."[114] As McCorvey has proved, there are tremendous collateral consequences. McCorvey has suffered guilt, shame, public humiliation, anguish of soul, and what she believes is complicity in murder knowing that her case has

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[109] Panel Opinion (Jones, J., concurring opinion). App. at 11.

[110] *See Agostini v. Felton*, 521 U.S. 203 (1997).

[111] *See* John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW § 2.12 at 72 (7th ed. 2004).

[112] *Roe v. Wade*, 410 U.S. 113, 166 (1973).

[113] *See* John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW § 2.12 at 74 (7th ed. 2004).

[114] *Id.* at 75.

caused the death of over 43 million babies.[115] She has also shared in the pain of post-abortive women. The State of Texas has suffered the consequences of not being able to ban abortion except to save the life of the mother, which it had done since 1854. The women have suffered collateral consequences of *Roe* through physical, emotional, and psychological harm. The nation has suffered the collateral consequences – as *Roe* has polarized Americans, influenced the political process and even the appointment of judges. Justice never sleeps, and it demands re-evaluation in light of changed conditions. Therefore, McCorvey's Rule 60 Motion is not moot.

CONCLUSION

This a case of national importance that can only be decided by this Court. As one of the post-abortive women testified, "Listen to the voices of those who have experienced the physical and emotional consequences."[116] Because it goes to the heart of the balance struck in *Roe* and involves substantial changes in the factual and legal conditions since 1973 that make *Roe* no longer just or equitable for prospective application, the petition for writ of certiorari should be granted.

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[115] *See* Affidavit of Norma McCorvey, App. at 31-42; *see also* Affidavit of Sandra Cano, "Doe" of *Doe v. Bolton*, attached as Exhibit E to original Rule 60 Motion.

[116] Shirley (R. 89).

Respectfully submitted,

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APPENDIX

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REVISED SEPTEMBER 17, 2004

United States Court of Appeals
for the Fifth Circuit

No. 03-10711

NORMA McCORVEY, FORMERLY KNOWN AS JANE ROE,

Plaintiff-Appellant,

versus

BILL HILL, DALLAS COUNTY DISTRICT ATTORNEY,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas

(Filed September 14, 2004)

Before JONES, WIENER, and PRADO, Circuit Judges.

EDITH H. JONES, Circuit Judge:

This case arises from the district court's denial of McCorvey's motion for relief from judgment pursuant to Fed. Rule Civ. Proc. 60(b). For the reasons set forth below, we dismiss.

BACKGROUND

Norma McCorvey filed a Rule 60(b) motion for relief from judgment in which she sought to have the district court revisit the Supreme Court's decision in *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed. 2d 147 (1973).

McCorvey, her identity then protected as "Jane Roe," was the named appellant in *Roe*. The district court denied McCorvey's motion after concluding that it was not filed within a reasonable time after final judgment was entered.[1]

DISCUSSION

We review the district court's denial of relief under Rule 60(b) for abuse of discretion. *See Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465, 470 (5th Cir. 1998); *Flowers v. S. Reg'l Physician Servs., Inc.*, 286 F.3d 798, 800 (5th Cir. 2002). The district court's denial of an evidentiary hearing is also subject to abuse of discretion review. *See Wichita Falls Office Assocs. v. Banc One Corp.*, 978 F.2d 915, 918 (5th Cir. 1992).

On appeal, McCorvey: (1) asserts that the district court improperly refused to convene a three-judge court; (2) challenges the district court's ruling on her Rule 60(b) motion; and (3) contends that she was entitled to an evidentiary hearing on her Rule 60(b) motion. We address each issue in turn.

A. Three-Judge Panel

Roe v. Wade proceeded before a three-judge district court empaneled pursuant to 28 U.S.C. § 2281. *See* 28 U.S.C. § 2281 (1970); 28 U.S.C. § 2284 (1970) (controlling

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[1] We dispensed with oral argument in this case because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. FED. R. APP. P. 34(a)(2).

the composition and procedure of three-judge district courts). Before its repeal,[2] § 2281 required a three-judge district court to hear and determine cases involving injunctions against the enforcement of state statutes based on allegations of unconstitutionality. *See Corpus v. Estelle*, 551 F.2d 68, 70 (5th Cir. 1977). McCorvey asserts that the single district court judge, who ruled on her Rule 60(b) motion, acted without authority. We disagree.

Although the original action was tried by a three-judge district court, the Rule 60(b) motion filed by McCorvey in 2003 was not properly a matter for a three-judge court. In *United States v. Louisiana,* 9 F.3d 1159, 1171 (5th Cir. 1993), this court ruled, in another action determined under § 2281 by a three-judge court, that a single district court judge, acting alone after the repeal of § 2281, could properly entertain and decide subsequent modified remedial orders. The instant context is no different: A single district court judge can decide threshold questions relating to McCorvey's Rule 60(b) motion even though the underlying judgment was originally tried by a three-judge court under the former § 2281. *See, e.g., Bond v. White*, 508 F.2d 1397, 1400-01 (5th Cir. 1975).

B. Rule 60(b)

McCorvey argues that the district court abused its discretion in rejecting her Rule 60(b) motion for relief from judgment as untimely. A question necessarily antecedent to McCorvey's substantive claim, however, is whether she has presented a justiciable case or controversy pursuant to

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[2] PUB. L. 94-391, AUG. 12, 1976, 90 STAT. 1119.

Article III of the Constitution. We are under an independent obligation to examine this jurisdictional question.

There are two conceivable bases for concluding that McCorvey does not present a live case or controversy – lack of standing and mootness. As the Supreme Court explained in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180, 120 S. Ct. 693, 704, 145 L.Ed. 2d 610 (2000), standing and mootness are related, but distinct, concepts. We may pretermit the question of standing if we find a case clearly moot. *See, e.g., Nomi v. Regents of Univ. of Minn.*, 5 F.3d 332, 334 (8th Cir. 1993).

The mootness doctrine "ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit . . . including the pendency of the appeal." *Cook v. Colgate*, 992 F.2d 17, 19 (2d Cir. 1993) (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395, 100 S. Ct. 1202, 1209 (1980)) (other citations omitted); *see also Rocky v. King*, 900 F.2d 864, 866 (5th Cir. 1990) (controversy must remain "live" throughout the litigation process). Mootness is the fatal issue for McCorvey.

"In general, a matter is moot for Article III purposes if the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Sierra Club v. Glickman*, 156 F.3d 606, 619 (5th Cir. 1998). Suits regarding the constitutionality of statutes become moot once the statute is repealed. *See Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 414-15, 92 S. Ct. 574, 575-76 (1972); *see also Fed'n of Adver. Indus. Executives, Inc. v. City of Chicago*, 326 F.3d 924, 930 (7th Cir. 2003) ("[W]e, along with all the circuits to address the issue, have interpreted

Supreme Court precedent to support the rule that repeal of a contested ordinance moots a plaintiff's injunction request, absent evidence that the City plans to or already has reenacted the challenged law or one substantially similar."); *Weeks v. Connick*, 733 F. Supp. 1036, 1037 (E.D. La. 1990).[3]

Under Texas law, statutes may be repealed expressly or by implication. *See Gordon v. Lake*, 356 S.W.2d 138, 139 (Tex. 1962). The Texas statutes that criminalized abortion (former Penal Code Articles 1191, 1192, 1193, 1194 and 1196) and were at issue in *Roe* have, at least, been repealed by implication. Currently, Texas regulates abortion in a number of ways. For example, a comprehensive set of civil regulations governs the availability of abortions for minors. *See* TEX. FAM. CODE §§ 33.002-011 (2000). Texas also regulates the practices and procedures of abortion clinics through its Public Health and Safety Code. *See* TEX. HEALTH & SAFETY CODE §§ 245.001-022; *see also Women's Med. Center of Northwest Houston v. Bell*, 248 F.3d 411, 414-16 (5th Cir. 2001) (discussing various portions of the Texas Abortion Facility License and Reporting Act). Furthermore, Texas regulates the availability of state-funded abortions. *See* 25 TEX. ADMIN. CODE § 29.1121

[3] As noted above, an exception to this mootness rule exists where there is evidence, or a legitimate reason to believe, that the state will reenact the statute or one that is substantially similar. *See City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289, 102 S. Ct. 1070, 1075 (1982); *Northeastern Florida Chapter of Associated Gen. Contractors*, 508 U.S. 655, 662, 113 S. Ct. 2297, 2301 (1993). This exception does not apply to the instant case. Texas has not adopted any substantially similar statute, nor is there a reasonable belief that it plans to reenact the statutory provisions struck down in *Roe*.

(2002); *see also Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 256 (Tex. 2002).

These regulatory provisions cannot be harmonized with provisions that purport to criminalize abortion. There is no way to enforce both sets of laws; the current regulations are intended to form a comprehensive scheme – not an addendum to the criminal statutes struck down in *Roe*. As the court stated in *Weeks*, a strikingly similar case, "it is clearly inconsistent to provide in one statute that abortions are permissible if set guidelines are followed and in another provide that abortions are criminally prohibited." 733 F. Supp. at 1038. Thus, because the statutes declared unconstitutional in *Roe* have been repealed, McCorvey's 60(b) motion is moot.[4]

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[4] The district court did not resolve the case on mootness grounds. Rather, the district court held that "McCorvey's 30-year delay is of such a great magnitude that her motion was not made within a reasonable time due to the length of time alone." Essentially, the district court concluded that a 30-year delay, regardless of the circumstances, is too long as a matter of law. We disagree. Rule 60(b)(5) and (b)(6) do not require the motion for relief from judgment be brought within a limited period of time. Instead, these provisions require only that the motion "be made within a reasonable time[.]" Fed. R. Civ. P. 60(b). Therefore, "[w]hat constitutes a reasonable time under Rule 60(b) depends on the particular facts of the case in question." *Fed. Land Bank of St. Louis v. Cupples Bros.*, 889 F.2d 764 (8th Cir. 1989); *United States v. Wyle*, 889 F.2d 242, 249 (9th Cir. 1989) ("What constitutes a reasonable time depends on the facts of each case.") (citation and quotation omitted); *Holland v. Virginia Lee Co., Inc.*, 188 F.R.D. 241, 248 (W.D. Va. 1999) ([T]here is no set time period distinguishing timely from untimely motions outside of the absolute, one-year time frame for Rule 60(b)(1)-(3) motions."). Accordingly, the district court erred in initially determining that the 30-year delay was "unreasonable" without examining the facts and circumstances of this particular case. The district court did hold, in the alternative, that the 30-year delay was "unreasonable" under the "facts and circumstances" of the case. However, we need not

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C. Evidentiary Hearing

Finally, the district court did not abuse its discretion in denying McCorvey's request for an evidentiary hearing. *See Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 171 (5th Cir. 1994) (denial of evidentiary hearing affirmed where court had written evidence sufficient to make its decision). An evidentiary hearing would have served no useful purpose in aid of the court's analysis of the threshold questions presented, which, as we explained, precluded the relief McCorvey sought.

CONCLUSION

For these reasons, rather than those articulated by the district court, the appeal from the district court's denial of McCorvey's Rule 60(b) motion for relief from judgment is **DISMISSED.**

EDITH H. JONES, Circuit Judge, concurring:

I agree that Ms. McCorvey's Rule 60(b) case is now moot. A judicial decision in her favor cannot turn back Texas's legislative clock to reinstate the laws, no longer effective, that formerly criminalized abortion.

It is ironic that the doctrine of mootness bars further litigation of this case. Mootness confines the judicial branch to its appropriate constitutional role of deciding actual, live cases or controversies. Yet this case was born

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reach that issue, which would require a substantive critique of McCorvey's claims, in light of our resolution of the matter on mootness grounds.

in an exception to mootness[5] and brought forth, instead of a confined decision, an "exercise of raw judicial power." *Doe v. Bolton,* 410 U.S. 179, 222; 93 S. Ct. 762, 763, 35 L.Ed.2d 739 (White, J., dissenting) (1973). Even more ironic is that although mootness dictates that Ms. McCorvey has no "live" legal controversy, the serious and substantial evidence she offered could have generated an important debate over factual premises that underlay *Roe.*

McCorvey presented evidence that goes to the heart of the balance *Roe* struck between the choice of a mother and the life of her unborn child. First, there are about a thousand affidavits of women who have had abortions and claim to have suffered long-term emotional damage and impaired relationships from their decision.[6] Studies by scientists, offered by McCorvey, suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions.[7]

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[5] *See Roe v. Wade,* 410 U.S. 113, 125; 93 S. Ct. 705, 713; 35 L.Ed.2d 147 (1973) ("Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review'.") (citations omitted).

[6] R. at 15-1410, Affidavits of More Than One Thousand Post-Abortive Women.

[7] *See* R. at 1669-1718, Affidavit of David Reardon, Ph.D. (reporting on clinical and scientific findings demonstrating that abortion is linked to emotional, physical, and psychological problems in women and criticizing the studies relied on by the *Roe* Court). *See also* C. A. Barnard, *The Long-Term Psychosocial Effects of Abortion* (Portsmouth, NH: Institute for Pregnancy Loss, 1990); W. Franz & D. Reardon, *Differential Impact of Abortion on Adolescents and Adults,* 27(105) Adolescence 161-72 (1992); M. Gissler, et al., *Suicides after pregnancy in Finland: 1987-94: register linkage study,* BMJ, 313:1431-4 (1996); B. Lask; J. Lydon, et al., *Pregnancy Decision Making as a Significant Life Event: A Commitment Approach,* 71(1) Journal of Personality and

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Second, *Roe's* assumption that the decision to abort a baby will be made in close consultation with a woman's private physician is called into question by affidavits from workers at abortion clinics, where most abortions are now performed. According to the affidavits, women are often herded through their procedures with little or no medical or emotional counseling.[8] Third, McCorvey contends that

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Social Psychology, 141-51 (1996); B. Major & C. Cozzarelli, *Psychosocial Predictors of Adjustment to Abortion*, 48(3) Journal of Social *Issues*, 48(3) 121-42 (1992); W. B. Miller, *An Empirical Study of the Psychological Antecedents and Consequences of Induced Abortion*, 48(3) Journal of Social Issues 67-93 (1992); W. B. Miller, *Testing a Model of the Psychological Consequences of Abortion*, The New Civil War: The Psychology, Culture, and Politics of Abortion, (American Psychological Assoc., Linda J. Beckman & S. Maria Harvey, eds. Washington, DC, 1998); H. Söderberg, et al., *Emotional distress following induced abortion: A Study of incidence and determinants among abortees in Malmö Sweden*, 79 Eur. J. Obstet. Gynecol. Reprod. Biol. 173-78 (1998); H. P. Vaughan, *Canonical Variates of Post Abortion Syndrome* (Portsmouth, NH: Institute for Pregnancy Loss, 1990); Gail B. Williams, *Induced Elective Abortion and Pre-natal Grief* (cited by Reardon).

[8] *See, e.g.*, R. at 1721-57, Affidavit of David Reardon, Ph.D. (reporting, based on numerous studies, investigations and interviews, that women visiting abortion clinics receive little to no counseling (and what counseling is received is heavily biased in favor of having an abortion), are rushed through the process, and exposed – without sufficient warning – to health risks ranging from unsanitary clinic conditions to physical and psychological damage); R. at 1668-1804, Exhibits to Affidavit of David Reardon, Ph.D. (studies, full interviews, and other analysis supporting conclusions); R. 4308-5188 Client Intake Records from Pregnancy Care Centers (cataloging the emotional, physical, and psychological symptoms felt by hundreds of women after having an abortion who then sought post-abortion counseling); R. at 5189-96 Affidavit of Carol Everett (written testimony of a former abortion clinic worker, reporting that, in her clinic, both abortion counselors and physicians worked on commission and aggressively followed a script to encourage prompt election of the procedure – even when the patient was not pregnant; that physicians usually performed 10 to 12 abortions per hour; that the clinic transported women to hospitals secretly by car when complications arose (to avoid bad

(Continued on following page)

the sociological landscape surrounding unwed motherhood has changed dramatically since *Roe* was decided. No longer does the unwed mother face social ostracism, and government programs offer medical care, social services, and even, through "Baby Moses" laws in over three-quarters of the states, the option of leaving a newborn directly in the care of the state until it can be adopted.[9] Finally, neonatal and medical science, summarized by McCorvey, now graphically portrays, as science was unable to do 31 years ago, how a baby develops sensitivity to

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publicity); and that she saw one woman die and 19 others permanently maimed by abortion procedures); R. at 10, Affidavit of Norma McCorvey (describing abortion facilities based upon her work experience in clinics).

[9] *See* Ala. Code § 26-25-1 *et seq.* (2000); Ariz. Rev. Stat. § 13-3623.01 (2001); Ark. Code Ann. § 9-34-202 (Michie 2001); Cal. Health & Safety Code § 1255.7 (Deering 2000); Colo. Rev. Stat. § 19-3-304.5 (2000); Conn. Gen. Stat. § 17a-57 *et seq.* (2000); Del. Code Ann. tit. 16 § 907a (2001); Fla. Stat. Ann. § 383.50 *et seq. (West* 2000); Ga. Code Ann. § 19-10a-1 *et seq.* (2002); Idaho Code § 39-8201 *et seq.* (2001); § 325 Ill. Comp. Stat. 2/1 *et seq.* (West 2001); Ind. Code § 31-34-2.5-1 *et seq.* (Michie 2000); Iowa Code § 233.1 *et seq.* (2001); Kan. Stat. Ann. § 38-15,100 (2000); Ky. Rev. Stat. Ann. § 405.075 (2002); La. Ch. Code Art. 1151 (West 2000); Me. Rev. Stat. Ann. tit. 17-A § 553 (2002); Md. Code Ann. Cts. & Jud. Proc. § 5-641 (2002); Mich. Comp. Laws § 750.135 (2000); Minn. Stat. § 145.902 (2000); Miss. Code Ann. § 43-15-201 *et seq.* (2001); Mo. Rev. Stat. § 210.950 (2002); Mont. Code Ann. § 40-6-401 *et seq.* (2001); N.Y. Penal § 260.03; Penal § 260.15; and, Soc. Serv. § 372-G (2000); N.C. Gen. Stat. § 7B-500 (2001); N.D. Cent. Code § 50-25.1-15 (2001); Ohio Rev. Code Ann. § 2151.3515 *et seq.* (Anderson 2001); Okla. Stat. tit. 10 § 7115.1 (2001); Or. Rev. Stat. § 418.017 (2001); Pa. Stat. Ann. tit. 23 § 6501 *et seq.* (2002); R.I. Gen. Laws § 23-13.1-1 *et seq.* (2001); S.C. Code Ann. § 20-7-85 (2000); S.D. Codified Laws § 25-5A-27 *et seq.* (Michie 2001); Tenn. Code Ann. § 68-11-255 (2001); Tex. Fam. Code Ann. § 262.301 *et seq.* (West 1999); Utah Code Ann. § 62A-4a-801 *et seq.* (2001); Wash. Rev. Code § 13.34.360 (2002); W. Va. Code § 49-6E-1 *et seq.* (2000); Wis. Stat. Ann. § 49.195 (West 2001); Wyo. Stat. Ann. § 14-11-101 *et seq.* (Michie 2003).

external stimuli and to pain much earlier than was then believed.[10] In sum, if courts were to delve into the facts underlying *Roe's* balancing scheme with present-day knowledge, they might conclude that the woman's "choice" is far more risky and less beneficial, and the child's sentience far more advanced, than the *Roe* Court knew.

This is not to say whether McCorvey would prevail on the merits of persuading the Supreme Court to reconsider the facts that motivated its decision in *Roe*.[11] But the problem inherent in the Court's decision to constitutionalize abortion policy is that, unless it creates another exception to the mootness doctrine, the Court will never be able to examine its factual assumptions on a record made in court. Legislatures will not pass laws that challenge the trimester ruling adopted in *Roe* (and retooled as the "undue burden" test in *Casey*; *see Casey,* 505 U.S. at 872-78, 112 S. Ct. at 2817-21). No "live" controversy will arise concerning this framework. Consequently, I cannot conceive of any judicial forum in which McCorvey's evidence could be aired.

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[10] *See* R. 5197-5347 (submissions from numerous individuals, each holding an MD or PhD, reporting that unborn children are sensitive to pain from the time of conception, and relying on peer-reviewed, scientific journals). *See, e.g.,* Mann et al., *Prevention of Allogeneic Fetal Rejection by Tryptophan Catabolism*, 281 Science 1191 (1998); P.W. Mantyh, *Inhibition of Hyperalgesia by Ablation of Lamina I Spinal Neurons Expressing the Substance P Receptor*, 278 Science 275 (1997) (cited by Dr. David Fu Chi Mark, Ph.D).

[11] Indeed, the Court seems disinclined ever to reconsider the facts, especially since in *Casey,* the Court's determinative plurality opinion refuses to justify *Roe* on its own terms and states conclusionally that "no change" in regard to the viability of a fetus's life "has left [*Roe's*] central holding obsolete." *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 860, 112 S. Ct. 2491, 2812, 120 L.Ed.2d 674 (plurality opinion) (1992).

At the same time, because the Court's rulings have rendered basic abortion policy beyond the power of our legislative bodies, the arms of representative government may not meaningfully debate McCorvey's evidence. The perverse result of the Court's having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter. This is a peculiar outcome for a Court so committed to "life" that it struggles with the particular facts of dozens of death penalty cases each year.

Hard and social science will of course progress even though the Supreme Court averts its eyes. It takes no expert prognosticator to know that research on women's mental and physical health following abortion will yield an eventual medical consensus, and neonatal science will push the frontiers of fetal "viability" ever closer to the date of conception. One may fervently hope that the Court will someday acknowledge such developments and re-evaluate *Roe* and *Casey* accordingly. That the Court's constitutional decisionmaking leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer not only about the abortion decisions, but about a number of other areas in which the Court unhesitatingly steps into the realm of social policy under the guise of constitutional adjudication.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NORMA McCORVEY, Plaintiff,	§ § §	
v.	§	Civil Action No.
BILL HILL, DALLAS COUNTY DISTRICT ATTORNEY, Defendant.	§ § § § § §	3:03-CV-1340-N (formerly 3-3690-B and 3-3691-C)

ORDER DENYING MOTION TO RECONSIDER

(Filed July 8, 2003)

Before the Court is Plaintiff Norma McCorvey's Rule 59 Motion for Reconsideration of this Court's Order Denying Rule 60(b) Motion (the "Order").[1] For the reasons stated below, the Court denies the motion for reconsideration.

The Court notes with some surprise that McCorvey first complains that the Order wrongly characterizes her motion as based on newly discovered evidence. *See* Rule 59 Motion ¶ 6. That is simply incorrect. The Order does not refer to newly discovered evidence, Rule 60(b)(2), or the one year time limit applicable to such motions. The Order acknowledges that the Rule 60(b) Motion was filed pursuant to Rule 60(b)(5) and (6) and analyzes it as such.

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[1] The Court will refer to McCorvey's original motion under Rule 60(b) as the "Rule 60(b) Motion," and the instant motion for reconsideration as the "Rule 59 Motion."

McCorvey also complains that this Court erred in holding her motion untimely due to the passage of thirty years alone. The Court wishes to clarify that it was not purporting to set out a bright line rule that thirty years is always too long for Rule 60(b) in every case. The Court's holding was that thirty years time, standing alone, was not a reasonable time *in this case*. The Court stands by that holding. McCorvey also ignores the fact that the Court proceeded to make an alternative holding based on a complete review of the facts and circumstances of the case. Order at 7. The Court likewise stands by that holding.

McCorvey cites several cases for the proposition that thirty years is a reasonable time. *See* Rule 59 Motion at 5 n.13; Brief at 4. Most of the cited cases involve consent decrees or other injunctions.[2] None of those cases even discuss the "reasonable time" requirement of Rule 60(b).

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[2] The three cases not involving a consent decree or other injunction do not help McCorvey's argument. McCorvey cites *Fed. Deposit Ins. Corp. v. Castle*, 781 F.2d 1101 (5th Cir. 1986), as permitting a Rule 60(b) motion two years after judgment. *See* Rule 59 Motion at 5 n.13. In fact, the Rule 60(b) motion in that case was filed 39 *days* after entry of judgment. *See* 781 F.2d at 1103 n.1. McCorvey also cites *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755 (6th Cir. 2002), as a case in which the "Court of Appeals for the Sixth Circuit recently reversed a district court which held that twenty-eight years was untimely." Brief at 4. While literally true, that description is misleading. The court of appeals reversed the district court on its finding of no subject matter jurisdiction and remanded the case for further proceedings; the majority did not address the district court's alternative finding that the motion was untimely, which the majority characterized as dicta. *Id.* at 758. As the concurring and dissenting opinion pointed out, the remand was an exercise in futility as the district court had already indicated the motion was untimely. *Id.* at 764. *United States v. Karahalias*, 205 F.2d 331 (2d Cir. 1953), was a naturalization case on unusual facts involving World War II, and is factually distinguishable.

That is perhaps because of the "universally recognized principle" in injunction cases "that a court has continuing power to modify or vacate a final decree." 11 A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE, AND PROCEDURE § 2961, at 391 (2d ed. 1995). This case, of course, does not involve an injunction. *See Roe v. Wade*, 314 F. Supp. 1217, 1224 (N.D. Tex. 1970); *Roe v. Wade*, 410 U.S. 113, 166 (1973). Accordingly, those cases dealing with a court's continuing jurisdiction over its own injunctions are inapposite.

McCorvey also argues that the Court's ruling on her Rule 60(b) Motion deprived her of due process. The Court finds that unpersuasive. She had notice of the timeliness requirement from the face of Rule 60(b), and she had an opportunity to be heard on timeliness in her motion. She simply failed to address the issue.[3] *See Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1409 n.8 (5th Cir. 1994) ("[I]n making the 60(b)(6) motions, and concerning the key issue of timeliness, the Liljebergs were obviously required, but failed, to support their motions with affidavits or other sworn proof that they did not know of [the factual basis for their motion] prior to July 23, 1993,"). As stated in the Order, McCorvey failed to carry her burden in that regard. Order at 7. Moreover, even considering the additional materials filed with her Rule 59 Motion, the Court finds that McCorvey has still failed to carry her

[3] Although in McCorvey's Rule 59 Motion, she attempts to depict her Rule 60(b) Motion as discussing timeliness, it does not. *See* Order at 7 n.9.

burden to show she filed her Rule 60(b) Motion within a reasonable time.[4]

Finally, McCorvey disagrees with this Court's holding that a ruling on timeliness of her Rule 60(b) Motion did not require the full three judge Court. The Court stands by its analysis in the Order.

Accordingly, McCorvey's Rule 59 Motion is DENIED.

SIGNED this 8th day of July, 2003.

/s/ David C. Godbey
David C. Godbey
United States District Judge

[4] Most of the case law upon which she relies to show a changed legal environment was decided long before 2003; much, though not all, of the scientific literature she cites was published long before 2003; and she fails to explain why the collection of affidavit evidence could not have been done long before 2003. She does explain, historically, why it *did not* occur earlier, but that is not the same as showing it *could not* have been done earlier.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NORMA McCORVEY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No.
	§	3:03-CV-1340-N (formerly
BILL HILL, DALLAS	§	3-3690-B and 3-3691-C)
COUNTY DISTRICT	§	
ATTORNEY,	§	
	§	
Defendant.	§	

ORDER DENYING RULE 60(B) MOTION

(Filed June 19, 2003)

Before the Court is Plaintiff Norma McCorvey's Rule 60(b) Motion for Relief from Judgment. The Supreme Court's decision in *Roe v. Wade,* 410 U.S. 113 (1973), ended this case over thirty years ago. McCorvey wants to reopen that judgment for this Court to conduct a wide-ranging inquiry into whether *Roe is* still good law in view of more recent Supreme Court decisions and the current state of scientific knowledge, The first order of business, however, is to decide whether Federal Rule of Civil Procedure 60(b) permits reopening that thirty year old judgment.

Rule 60(b) provides only an extraordinary, limited exception to the finality of judgments, and a motion under Rule 60(b) must therefore be brought within a "reasonable time" after the judgment. Court opinions measure a "reasonable time" under Rule 60(b) in weeks or months, not in decades. Thirty years is manifestly not a reasonable time. The Court therefore denies McCorvey's motion for relief from judgment without considering the substance of

her criticisms of *Roe*; that must wait for a different party before another court in a proper case.

I. THE RULE 60(B) MOTION DOES NOT REQUIRE A THREE-JUDGE COURT

McCorvey asks this Court to reconvene a three-judge court to consider her Rule 60(b) motion. Because the Court finds that a single judge can entertain a post-judgment motion such as this, the Court declines to request the Chief Judge of the Fifth Circuit to reconstitute the three judge court.

A three-judge court originally heard this case, pursuant to 28 U.S.C. § 2281 (1970). *Roe v. Wade,* 314 F. Supp. 1217 (N.D. Tex. 1970) (Goldberg, Hughes & Taylor, JJ.). The Act of August 12, 1976 repealed section 2281. Pub. L. No. 94-381, 90 Stat. 1119. That Act provides: "This Act shall not apply to any action commenced on or before the date of enactment." *Id.* § 7. Because McCorvey originally filed this case before August 12, 1976, it remains subject to the otherwise-repealed section 2281.[1]

The simple proposition that this case is subject to section 2281 does not answer the question of whether a single judge can resolve the post-judgment Rule 60(b)

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[1] That section provides: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." 28 U.S.C. § 2281 (1970).

motion. Section 2281 invokes the procedure of section 2284. Section 2284 was likewise amended by the Act of August 12, 1976, and the amendments to section 2284 likewise do not apply to this case. The pre-amendment version of section 2284 provides in part:

> Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before the final hearing.

28 U.S.C. § 2284(5) (1970).[2] Because the disposition of a Rule 60(b) motion constitutes an "order[] required or permitted by the rules of civil procedure" and is not

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[2] That language was substantially carried forward by the Act of August 12, 1976 into the current version of section 2284: "A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment." 28 U.S.C. § 2284(b)(3) (2001).

excluded by the second sentence of section 2284,[3] a single judge may decide a Rule 60(b) motion.

This result flowing from the text of the statute finds support in both case law and Congressional policy. Case law under section 2284 permits a single judge to handle not only preliminary, threshold matters,[4] but also post-judgment matters[5] in three-judge court cases. In a certain sense, a Rule 60(b) motion fits both categories, because while it is post judgment, it is also a threshold question of whether there should be any further proceedings on the merits. This result is also consistent with the Congressional policy "to allocate as many functions as possible to a single district judge, consistent with the statutory purpose." S. REP. NO. 94-204, at 13 (1975), *reprinted in* 1976 U.S.C.C.A.N. 1988, 2001 (quoting Note, *The Three-Judge*

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[3] The issue in McCorvey's Rule 60(b) motion presently before the Court is simply whether the prior judgment should be reopened. It does not address final relief on the merits and is not a "motion to . . . enter a . . . final judgment" prohibited to a single judge under former section 2284(5). It merely determines whether the extant judgment should be reopened. If the judgment in this case were reopened, the ensuing question of what relief should be granted on the merits might belong before a three-judge court. But the preliminary question of whether to reopen the judgment is not within the bar of the second sentence of former section 2284(5).

[4] *See* 17 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4235, at 614-16 & nn.41, 43 (2d ed. 1988) (citing cases where single judge dismissed matters for: insubstantial constitutional question, lack of standing, lack of subject matter jurisdiction, lack of amount in controversy, failure to join indispensable parties, failure to state a claim, and inappropriateness of equitable relief) [hereinafter WRIGHT & MILLER].

[5] *Id.* § 4235, at 624 n.69 (citing cases where single judge acted post-judgment to: assess damages, rule on writ of assistance in aid of judgment, establish time limit for compliance, hear civil contempt proceedings, tax costs, and award attorneys' fees).

District Court: Scope and Procedure Under Section 2281, 77 HARV. L. REV. 299, 306 (1963)).[6] *See also Bailey v. Patterson,* 369 U.S. 31, 33 (1962) ("three judge requirement is a technical one to be narrowly construed"). Accordingly, the Court declines to request the Chief Judge of the Fifth Circuit to reconvene the three-judge court to consider McCorvey's Rule 60(b) motion.[7]

II. MCCORVEY DID NOT BRING HER MOTION WITHIN A REASONABLE TIME

McCorvey moves the Court for relief from judgment under Rule 60(b)(5) & (6). Rule 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or

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[6] This citation is to the legislative history of the Act of August 12, 1976. Because that Act substantially brought forward the language of section 2284(5), the expression of Congressional intent would appear to be applicable to the predecessor statute as well.

[7] McCorvey is not entitled to review of this Order by a three-judge court either. The last sentence of pre-amendment section 2284(5) permits review of a single judge's decisions by the full three-judge court "at any time *before* the final hearing." 28 U.S.C. § 2284(5) (1970) (emphasis added). It is now 33 years after the final hearing by the three-judge court, so the statute does not permit review by a three-judge court; any review lies with the Court of Appeals. *Accord Hamilton v. Nakai,* 453 F.2d 152 (9th Cir. 1971), *cert. denied,* 406 U.S. 945 (1972) (single judge could consider post-judgment application for writ of assistance, and denial of that relief falls within appellate jurisdiction of court of appeals).

> it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. *The motion shall be made within a reasonable time,* and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

FED. R. CIV. P. 60(b) (emphasis added). Because the Court finds the lapse of thirty years to exceed a reasonable time, the Court denies McCorvey's motion.

"As a general rule, the desirability of orderliness and predictability in the judicial process speaks for caution in the reopening of judgments." *Allen v. Jacobson,* 82 F.R.D. 355, 358 (N.D. Tex. 1979) (citing *Fackelman v. Bell,* 564 F.2d 734, 735 (5th Cir. 1977)). Courts "have administered Rule 60(b) with a scrupulous regard for the aims of finality" and impose "a requirement of exceptional or extraordinary circumstances [in] motions under Rule 60(b)(6)." 11 WRIGHT & MILLER § 2857, at 259, 260. With that general view of Rule 60(b) in mind, the Court will address whether McCorvey's motion was filed within a reasonable time.

In *Travelers Ins. Co. v. Liljeberg Enterprises, Inc.,* 38 F.3d 1404, 1410 (5th Cir. 1994), the Court observed:

> [A] 60(b)(6) motion is not subject to the one year limitation imposed upon subparts (1) through (3). Instead, a party seeking 60(b)(6) relief must file the motion within a "reasonable time," [*Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 863 (1988)], which depends upon the particular facts and circumstances of the case. *First RepublicBank Fort Worth v. Norglass, Inc.,* 958 F.2d 117, 119 (5th Cir. 1992); *Ashford v. Stewart,* 657 F.2d 1053, 1055 (9th Cir. 1981) ("What constitutes 'reasonable time' depends on the facts of

> each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties.").

In considering those principles,[8] courts have found time ranges of weeks to months to even a few years to be within a reasonable time, *see* WRIGHT & MILLER § 2866, at 385 n.8 (collecting cases); courts have also found those same time ranges *not* to be within a reasonable time. *See id.* § 2866, at 386 n.9 (collecting cases). This Court has not found *any* case in which a period *remotely* close to thirty years was considered a "reasonable time" under Rule 60(b). Accordingly, the Court finds that McCorvey's thirty year delay is of such great magnitude that her motion was not made within a reasonable time due to the length of time alone.

Alternatively, and additionally, the Court will consider whether thirty years constitutes a reasonable time in view of "the particular facts and circumstances of the case." That examination is made more difficult because McCorvey does not discuss timeliness anywhere in her twenty-two page motion or its fifty-five page supporting brief.[9] As the movant, it is incumbent on McCorvey to plead and prove that her motion was filed within a reasonable time of the judgment. *See Travelers,* 38 F.3d at 1409 n.8 ("[I]n making the 60(b)(6) motions, and concerning the key issue of

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[8] Those principles apply with equal force to timeliness under Rule 60(b)(5).

[9] Although McCorvey does discuss "new" evidence at length, that is in the context of the merits of her Rule 60(b) motion. In that connection, she argues only that the "new" evidence was not available in 1973. The current state of the record indicates that with reasonable diligence, the additional evidence she tenders could have been presented long before 2003.

timeliness, the Liljebergs were obviously required, but failed, to support their motions with affidavits or other sworn proof that they did not know of [the factual basis for their motion] prior to July 23, 1993."). McCorvey likewise failed to carry her burden in that regard. Based on the Court's review of McCorvey's motion and supporting documentation and taking into account the facts of this case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties, the Court finds that McCorvey' s Rule 60(b) motion, thirty years after the fact, was not made within a reasonable time.[10]

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[10] The Court has decided this motion without an evidentiary hearing for two reasons. First an evidentiary hearing would not aid the Court's determination. No evidence at the hearing will contest that: 2003-1973=30. Moreover, McCorvey does not request an evidentiary hearing on the issue of the timeliness of her motion, but only on the substantive bases for the motion. *See Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 873 (5th Cir. 1989) ("Considering the extensive pleadings and the failure of the plaintiffs to adequately indicate how a hearing would have aided the court's determination, we find that the district court did not abuse its discretion in not holding a hearing."). Secondly, timeliness is not the only infirmity in McCorvey's motion. Before considering McCorvey's argument that *Roe* has been supplanted by law and science (a matter hardly within *this* Court's purview) or whether Rule 60(b)(5) or (6) would afford relief from the judgment (a question problematic on its own procedural merits), the Court would need to address numerous other threshold issues implicitly raised by her motion, including but not limited to: standing, mootness, judicial estoppel, stare decisis, and the binding nature of Supreme Court precedent upon this Court. Given that this motion is plainly untimely, to delay resolution until after an evidentiary hearing would needlessly require the Court and the litigants to devote significant resources to these additional serious threshold questions.

CONCLUSION

Whatever else it may or may not have done, the Supreme Court's *Roe* decision thirty years ago ended *this* lawsuit between *these* parties. Whether or not the Supreme Court was infallible, its *Roe* decision was certainly final in this litigation. It is simply too late now, thirty years after the fact, for McCorvey to revisit that judgment. Other parties in other cases may be able to reexamine those issues, but not McCorvey in this case. Accordingly, McCorvey's Rule 60 Motion for Relief from Judgment is hereby DENIED.

SIGNED this 19th day of June, 2003.

/s/ David C. Godbey
David C. Godbey
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-10711

NORMA MCCORVEY, formerly known as Jane Roe
Plaintiff-Appellant

v.

BILL HILL, Dallas County District Attorney
Defendant-Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING EN BANC

(Filed Oct. 18, 2004)

(Opinion 9/14/04, 5 Cir. ___, ___ F.3d ___)

Before JONES, WIENER, and PRADO, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel

Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

U.S. Constitution Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule of Civil Procedural

Rule 60. Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable

time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Texas Statutes

Art. 1191. **Abortion.** – If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused. [Acts 1907, p. 55.]

Art. 1192. **Furnishing the means.** – Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Art. 1193. **Attempt at abortion.** If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Art. 1194. **Murder in producing abortion.** – If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Art. 1196. **By medical advice.** – Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Norma McCorvey, formerly known as JANE ROE	§	
Plaintiff,	§	
vs.	§	**CIVIL ACTION**
HENRY WADE, Through His Official Successor in Office, William "Bill" Hill, Dallas County District Attorney,	§	**NO. 3-3690-B and NO. 3-3691-C**
Defendant.	§	

AFFIDAVIT OF NORMA MCCORVEY

STATE OF TEXAS	§	
	§	KNOW ALL MEN BY
	§	THESE PRESENTS:
COUNTY OF DALLAS	§	

BEFORE ME, the undersigned authority, on this day personally appeared NORMA MCCORVEY, who after being duly sworn upon her oath deposed and said as follows:

1. My name is Norma McCorvey and I reside in Dallas, Texas. I am competent to make this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. Thirty-three years ago, I came before the United States District Court Northern District of Texas Dallas Division as the Plaintiff "Jane Roe", the young woman whose case legalized abortion in the United States, *Roe v. Wade*. At that time, I was an uninformed

young woman. Today I am a fifty-five-year old woman who knows the tragedy that arose from my unsuspecting acquiescence in allowing my life to be used to legalize abortion.

3. In 1970, I told this Court in the form of an affidavit that I desired to obtain an abortion never really understanding the ramifications. Today, I once again appear before this Court in the form of an affidavit to present evidence never presented in my earlier case, but today I come with a complete understanding of what my participation *Roe v. Wade* has brought to this country. My personal experience with this three-decade abortion-experiment has compelled me to come forward, not only for myself and the women I represented then, but for those women whom I now represent. It is my participation in this case that began the tragedy, and it is with great hope that I now seek to end the tragedy I began.

4. Because of my role in *Roe v. Wade* and my subsequent experience with abortion, this Court will be provided with information and a perspective unavailable from other source. Previously, the courts, without looking into my true circumstances or taking the time to decide the real impact abortion would have upon women, used me, my life, and my circumstances to justify abortion. Those judges who made the earlier decisions never had the advantage of the real facts to base their decision because the entire basis for *Roe v. Wade* was built upon false assumptions. Consequently, the decision was rendered in a vacuum totally devoid of findings of facts and solely based upon what abortion advocates wanted women. Because the courts allowed my case to proceed without my testimony, without ever explaining to me the reality of abortion, without being cross-examined on my erroneous perception of abortion, a tragic mistake

was made – a mistake that this Court has the opportunity to remedy.

5. The years following the *Roe v. Wade* decision have been very difficult, in a number of respects, but my life was never easy. Prior to my pregnancy with the "Roe" baby, I gave birth to two other children. My first, a daughter, was adopted by my mother. It was difficult to part with my child, yet I have always been comforted by the fact that my daughter is alive. My second daughter was raised by her father, a young intern at Baylor Methodist Medical School. He wanted to get married and make a home, but I wasn't ready for that kind of commitment. Later, when I became pregnant with the "Roe" baby, I was really in a predicament. My mother expressed her disapproval and told me how irresponsible I had been. She made it clear that she was not going to take care of another baby.

6. Although I knew I was pregnant, I waited for a while before I went to the doctor. While I was waiting to be examined, I questioned the some of ladies in the waiting room about whether they knew where a woman could go to have an abortion. A lady told me where an illegal clinic was located and told me that it would cost $250.00. Following our discussion, I told the doctor that I wanted to have an abortion, but he refused stating that abortion was illegal. He didn't believe in abortion and gave me the phone number of an adoption attorney.

7. When I had saved about two hundred dollars, I took a cross-town bus to the illegal clinic, which turned out to be a dentist's office that had been closed down the previous week. For some reason, I felt relieved yet angry at the same time. All my emotions were peaking; first, I was angry, then I was happy, and then I'd cry. From the abortion clinic, I took the bus

to my dad's apartment and decided to speak with the adoption attorney. The attorney set up the meeting and referred me to Sarah Weddington, the attorney who represented me in *Roe v. Wade.*

8. Following the adoption attorney's introduction, Weddington invited me out to dinner. Although Weddington and I were about the same age, our lives were quite different. She was a young attorney, and I was homeless and lived in a park. Unconcerned about politics, I sold flowers and an underground newspaper that described the types and availability of illegal narcotics. At the time, I simply sought to survive. During our initial meeting, I met with Sarah Weddington and her friend, Linda Coffee. Both Weddington and Coffee had recently finished law school, and they wanted to bring a class action suit against the State of Texas to legalize abortion.

9. During our meeting, they questioned me, "Norma, don't you think that abortion should be legal?" Unsure, I responded that I did not know. In fact, I did not know what the term "abortion" really meant. Back in 1970, no one discussed abortion. It was taboo, and so too was the subject of abortion. The only thing I knew about the word was in the context of war movies. I had heard the word "abort" when John Wayne was flying his plane and ordered the others to "Abort the mission." I knew "abort" meant that they were "going back". "Abortion", to me, meant "going back" to the condition of not being pregnant. I never looked the word up in the dictionary until after I had already signed the affidavit. I was very naive. For their part, my lawyers lied to me about the nature of abortion. Weddington convinced me, "It's just a piece of tissue. You just missed your period." I didn't know during the *Roe v. Wade* case that the life of a human being was terminated.

10. That evening, the two female lawyer and I discussed the case over a few pitchers of beer and pizza at a small restaurant in Dallas. Weddington, Coffee, and I were drinking beer and trying to come up with a pseudonym for me. I had heard that whenever women were having illegal abortions, they wouldn't carry any identification with them. An unidentifiable woman was often referred to as Jane Doe. So we were trying to come up with something that would rhyme with "Doe". After three or four pitchers of beer, we started with the letter "a" and eventually we reached "r" and agreed on "Roe". Then I asked, "What about Jane for the first name?" Janie used to be my imaginary friend as a child. I told them about her and how she always wanted to do good things for people, and it was decided – I became Jane Roe, by the stroke of a pen.

11. These young lawyers told me that they had spoken with two or three other women about being in the case, but they didn't fit their criteria. Although I did know what "criteria" meant, I asked them if I had what it took to be in their suit. They replied, "Yes. You're white. You're young, pregnant, and you want an abortion." At that time, I didn't know their full intent. Only that they wanted to make abortion legal, and they thought I'd be a good plaintiff. I came for the food, and they led me to believe that they could help me get an abortion.

12. After our meeting, I went to my father's apartment and began to drink alcohol heavily. I was depressed with my plight in life. I tried to drown my troubles in alcohol. Shortly thereafter I even attempted suicide by slitting my wrists. When my father questioned me about what was troubling me, I responded that I was pregnant again. When he asked me what I was going to do, I responded that I was thinking about having

an abortion. He inquired, "What is that?" I said, "I don't know. I haven't looked it up yet."

13. Later, Weddington and Coffee presented the affidavit for my signature at Coffee's office. I told them that I trusted them and that I did not need to read the affidavit before I signed it. I never read the affidavit before signing it and do not, to this very day, know what is written in the affidavit. Both Weddington and Coffee were aware that I did not read the affidavit before I signed it. At no time did they tell me that I had to read it before they accepted my signature. I told them that I trusted them. We called ourselves "the three musketeers." I know now that is one place where I went wrong. I should have sat down and I should have read the affidavit. I may not have understood everything in the affidavit and I would have probably signed it anyway. I trusted the lawyers.

14. My lawyers never discussed what an abortion is, other than to make the misrepresentation that "it's only tissue". I never understood that the child was already in existence. I never understood that the child was a complete separate human being. I was under the false impression that abortion somehow reversed the process and prevented the child from coming into existence. In the two to three years during the case no one, including my lawyers told me that an abortion is actually terminating the life of an actual human being. The courts never took any testimony about this, and I heard nothing which shed light on what abortion really was.

15. In 1972, Sarah Weddington argued in the courts, presumptuously on my behalf, that women should be allowed to obtain a legal abortion. The courts did not ask whether I knew what I was asking for. The abortion decision that destroyed every state law protecting the rights of women and their unborn babies was

based on a fundamental misrepresentation. I had never read the affidavit, and I did not know what an abortion was. Weddington and the other supporters of abortion used me and my circumstance to urge the courts to legalize abortion without any meaningful trial which addressed the humanity of the baby, and what abortion would do to women. At that time, I was a street person. I lived, worked, and panhandled out on the streets. My totally powerless circumstance made it easy for them to use me. My presence was a necessary evil. My real interests were not their concern.

16. As the class action plaintiff in the most controversial U.S. Supreme Court case of the twentieth century, I only met with the attorneys twice. Once over pizza and beer, when I was told that my baby was only "tissue" and another time at Coffee's office to sign the affidavit. I had no other personal contacts. I was never invited into court. I never testified. I was never present before any court on any level, and I was never at any hearing on my case. The entire case was an abstraction. The facts about abortion were never heard . Totally excluded from every aspect and every issue of the case, I found out about the decision from the newspaper just like the rest of the country.

17. In a way, my exclusion, and the exclusion of real meaningful findings of fact in *Roe v. Wade*, is symbolic of the way in which the women of the nation and their experiences with abortion have been ignored in a national debate by the abortion industry. The view that is presented is the view of what the abortion industry thinks is good for women. The reality of women's experiences is never presented.

18. I never had an abortion and gave the baby up for adoption. It was only later in life that I was confronted with the reality of abortion. Being unskilled

and uneducated, with alcohol and drug problems, finding and holding a job was always a problem for me. But with my notoriety from *Roe v. Wade,* abortion facilities, usually paying a dollar an hour more than minimum wage, were always willing to add "Jane Roe" to their ranks.

19. In 1992, I began working in abortion facilities where I was always in control. I could either make a woman stay or help her leave. My duties were similar to those of a LVN or an RN, such as taking patients' blood pressure and pulse and administering oxygen, although I never took any statistics or temperatures. Basically, I would stand inside the procedure room, hold the women's hands, and say things to distract them by saying, "What is the most exciting, or happiest period of your life?" Meanwhile, the abortionist was performing what is represented as a "painless" procedure and the women were digging their nails into me in an effort to endure the pain.

20. I worked in several abortion facilities over the years. In fact, I even worked at two facilities at the same time. They were all the same with respect to the condition of the facilities and the "counseling" the women receive. One clinic where I worked in 1995 was typical: Light fixtures and plaster falling from the ceiling; rat droppings over the sinks; backed up sinks; and blood splattered on the walls. But, the most distressing room in the facility was the "parts room". Aborted babies were stored here. There were dead babies and baby parts stacked like cordwood. Some of the babies made it into buckets and others did not, and because of its disgusting features, no one ever cleaned the room. The stench was horrible. Plastic bags full of baby parts that were swimming in blood were tied up, stored in the room and picked up once a week. At another clinic, the dead babies were kept in a big white freezer full of dozens of jars, all

full of baby parts, little tiny hands, feet, and faces visible through the jars, frozen in blood. The abortion clinic's personnel always referred to the dismembered babies as "tissue."

21. While all the facilities were much the same, the abortion doctors in the various clinics where I worked were very representative of abortionists in general. The abortionists I knew were usually of foreign descent with the perception that the lax abortion laws in the United States present a fertile money-making opportunity. One abortionist, in particular, would sometimes operate bare-chested, and sometimes shoeless with his shirt off, and earned a six-figure income. He did not have to worry about his bedside manner, learning to speak English, or building a clientele.

22. While the manners of the abortionists and the uncleanliness of the facilities greatly shocked me, the lack of counseling provided the women was also a tragedy. Early in my abortion career, it became evident that the "counselors" and the abortionists were there for only one reason – to sell abortions. The extent of the abortionists' counseling was, "Do you want an abortion? Ok, you sign here and we give you abortion." Then he would direct me, "You go get me another one." There was nothing more. There was never an explanation of the procedure. No one even explained to the mother that the child already existed and the life of a human was being terminated. No one ever explained that there were options to abortion, that financial help was available, or that the child was a unique and irreplaceable. No one ever explained that there were psychological and physical risks of harm to the mother. There was never time for the mother to reflect or to consult with anyone who could offer her help or an alternative. There was no informed consent. In my opinion, the only thing

the abortion doctors and clinics cared about was making money. No abortion clinic cared about the women involved. As far as I could tell, every woman had the name of Jane Roe.

23. Typically, most of the women would cry as soon as the suction machine was shut off, or, at some point. Sometimes, I thought that they realized what had been done to their babies. Once, I heard a woman call her mother and say, "I just killed my baby. I'm so glad you never killed me!"

24. The doctors always hid the truth from the mothers. I would say about eighty-percent of the women would try to look down during the abortion and try to see what was happening. This is the reason the doctors would start with the scalpel: to make sure there was just blood and torn up "tissue" for the women to see. Specifically, I remember one woman who came in for an abortion, a pretty, sweet young woman about eighteen years old, with a teddy bear. During the procedure she looked down and saw the baby's hand fall into the doctor's hand. She gasped and passed out. When she awoke and asked about what she saw, I lied to her and told her it didn't happen. But she insisted that she had seen part of her baby. A few weeks later, when she returned for her follow-up exam, she was a changed person: her sweetness had died and had been replaced with an indescribable hardness. I could not look her in the eye. It took quite a few beers that night to make that particular day go away.

25. In all of the clinics where I worked, the employees were forbidden to say anything that might talk the mother out of an abortion. While the abortionists' counseling was non-existent, my counseling technique gradually became different depending on my mood and the stage of my career. The experience of

abortion began to take its toll on me. In later years, I would sometimes take all the instruments that were used in an abortion procedure and purposely leave a little of the blood on some the instruments. Laying the instruments out on the little table in front of the woman, I would tell her, "This is the first instrument that is going to be inserted into your vaginal area." It would have just had a little smudge of blood, and I thought it was very dramatic. In retrospect, I don't even know why I was doing these things. It was as if I was trying to talk these women out of the abortion – something we were forbidden to do. In other counseling sessions, I would demonstrate the position and warn her that the instruments were sharp, and that if she moved the doctor might slip, and puncture her uterus, and she would bleed to death. In other situations, when a woman asked me how much it cost, I asked her in response how much she wanted to pay to kill her baby. She replied, "They told me it wasn't a baby." I responded, "What do you think it is inside you, a fish?" Other times, I would comfort them after the abortion by saying, "It wasn't a baby. It was only a missed period." Sometimes when I managed to make the women unsure, I would offer to refund their money except for the ultrasound.

26. After I saw all the deception going on in the abortion facilities, and after all the things that my supervisors told me to tell the women, I became very angry. I saw women being lied to, openly, and I was part of it. There's no telling how many children I helped kill while their mothers dug their nails into me and listened to my warning, "Whatever you do, don't move!" Because I was drunk or stoned much of the time, I was able to continue this work for a long time, probably much longer than most clinic workers. It is a high turnover job, because of the true nature of the business. The abortion business is an inherently dehumanizing

one. A person has to let her heart and soul die or go numb to stay in practice. The clinic workers suffer, the women suffer, and the babies die. I can assure this Court that the interest of these mothers is not a concern of abortion providers. I obviously advocated legalized abortion for many years following *Roe v. Wade*. But, working in the abortion clinics forced me to accept what abortion really is: It is a violent act which kills human beings and destroys the peace and the real interests of the mothers involved.

/s/ Norma McCorvey
Norma McCorvey a.k.a. Jane Roe of *Roe v. Wade*

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority, on this day of 6-11-03, 2003.

/s/ Raymond J. Sexton
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS

[SEAL] RAYMOND J. SEXTON
Notary Public
STATE OF TEXAS
Commission
Expires: 10/27/03

AFFIDAVIT

* * *

The State of CA

* * *

Cheryl Allen

* * *

Tell when and where your abortion occurred: Even while I was married I had the first in Los Angeles in 1970; the second in Long Beach – 1973

* * *

How has your abortion affected you? Great sorrow and shock when I realized what I had done out of sheer ignorance. I *miss* deeply the child that I lost by spontaneous abortion and the 2 children whom I murdered. I love my living 3 children with all my heart and wish I knew the other 3 that I don't have. I have so much time for them all now.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? Do not murder to solve an "inconvenience" children – all children are a GIFT from the Lord. He will provide for them. Many childless couples are on waiting lists, longing to adopt a child. Your child is NEVER unwanted.

Based on your own experience, what would you tell a court that believes abortion should be legal? Human life which is sacred begins at conception and any act to end that life constitutes murder of the 1st Degree. All pregnant women should be protected from all harm due to two lives (at least) together, both most vulnerable.

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[000027]

AFFIDAVIT

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The State of District of Colombia (Washington, D.C.)

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Lisa Harrison
Anthony

* * *

Tell when and where your abortion occurred: February 1973 in a clinic in Washington, D.C. and at Walter Deed Medical Center in Washington, D.C.

* * *

How has your abortions affected you? It nearly destroyed me. I was so guilty. I never felt whole.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? Don't do it!!!!!!!!!!!!! If you must, give the baby away in adoption.

Based on your own experience, what would you tell a court that believes abortion should be legal? I would say that I would not want to be in their shoes on judgement day.

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[000037]

AFFIDAVIT

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The State of Kentucky

* * *

Lisa K. Arnold

* * *

Tell approximately when and where your abortion occurred: 11-1-75 Toledo, Ohio

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How has your abortion affected you? It forever altered my life physically, emotionally, and spiritually. I was never able to have children. I suffered from depression, anger, lowered self-esteem, anxiety, fear & startle reactions. It took me 20 years to come back into a relationship with God because I was afraid he hated me for what I had done. Part of me died with my child that day.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? That she will never be the same. Women were created to nurture their children not kill them. No one kills with impurity and the ramifications are life long. If killing your child is considered a good decision, what would a bad decision be?

Based on your own experience, what would you tell a court that believes abortion should be legal? The same thing I just stated above based not only on my experience but the

hundreds of post-abortive women I have counseled over the past 8 years.

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[000048]

AFFIDAVIT

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The State of Colorado

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Susan L. Babcock

* * *

Tell when and where your abortion occurred: March 1977 in Fort Worth, Texas. I do not know the name of the clinic.

* * *

How has your abortion affected you? My abortion has affected me in numerous ways. I felt tremendous guilt and confusion in the recovery room. I felt I had done something terribly wrong but didn't understand why I felt that way. I was very depressed and withdrawn afterward and could not talk about what I was feeling. I was unable to discuss the abortion for many years, despite my husband trying to discuss it with me. I never revealed my abortion as part of my medical history. It affected my relationship with my husband for over 20 years. I worried about being punished for killing my baby and feared I would lose my children after they were born. I have had many medical problems that I attribute to having the abortion including pre-term pregnancies, abnormal paps, and abnormal periods.

* * *

Based on your own experiences, what would you tell a woman thinking of having an abortion? I would tell her to reconsider and to not have an abortion. I would tell her of the many long-term effects of the abortion. I would tell her of the physical, emotional and spiritual consequences of having an abortion. I have shared my personal experience many times with women considering an abortion and the pain associated with having the abortion, as well as the affects of those that have trusted me with their abortion experience. I would tell her that I think it is murder.

Based on your own experience, what would you tell a court that believes abortion should be legal? I would first say I believe it is murder to kill an unborn child. I would say that if woman knew what they later learned from their mistake, they would understand that it was murder. I would tell them of the hidden statistics of the many long-term effects women suffer in relation to having an abortion such as miscarriage, reproductive problems, and the mental aguish of taking a life. I would say to the courts that if a woman saw pictures of what a fetus was like developmentally, how brutal the abortion procedure is, how a baby suffers during the procedure, and the possible long term effects, they would never choose to end their babies life. I would tell the courts of the many women I have met who are still suffering because of their abortions and they don't know why. I would say I have not met anyone who has had an abortion who has not expressed regret in having it. I would tell the courts they should be protecting women from this harmful procedure and to not be influenced by the those profiting from [000058] abortions. I would tell them to listen to the experience of those

who have gone through an abortion and to not listen to those who have something to gain from performing them.

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[000059]

AFFIDAVIT

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The State of Arizona

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Catherine C. Barnella

* * *

Tell approximately when and where your abortion occurred: August 1974 San Diego, CA

* * *

How has your abortion affected you?

I have lived with regrets and feelings of guilt since 1974. Every day is thoughts of what I experienced. Depression is within reach, I have to fight it every day. When I think I have dealt with it all, I am frequently overwhelmed with emotions and have to start over.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? I would tell her, that abortion is Not a quick fix or a reasonable solution, it is something that she will have to live with the rest of her life. There are alternatives, choose Life!

Based on your own experience, what would you tell a court that believes abortion should be legal? I would tell the

court that abortion isn't about ending a pregnancy, its about killing a child and affecting women in ways they would never understand. 2 lives destroyed.

[000071]

AFFIDAVIT

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The State of Colorado

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Terri Baxter

* * *

Tell when and where your abortion occurred: Summer 1974 in Atlanta, GA

* * *

How has your abortion affected you? for years I lived with guilt & shame & fear not being able to talk about it. I have been through a divorce – I believe is directly linked to the abortions. I also believe the breast cancer is a direct link.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? Not to have it – there are to many other options and help available. Also, of all the women I've talked to – the ones who had an abortion sooner or later regretted it & the ones that carried to term never regretted it.

Based on your own experience, what would you tell a court that believes abortion should be legal? the physical, & emotional risks are to great to put a woman through.

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[000088]

AFFIDAVIT

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The State of Minnesota

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Karen A. Bellmore

* * *

Tell when and where your abortion occurred: April 2, 1982 at Midwest Women's Health Center in Minneapolis, MN.

* * *

How has your abortion affected you? Very negative. I was sad & depressed for years, and I'm still very saddened that I made such a terrible decision. The worst part is the guilt & anger within.

* * *

Based on your own experiences, what would you tell a woman thinking of having an abortion? Don't do it! You will regret it the rest of your life. No matter what the reason, don't have an abortion because you would be killing your own child. I believe it is not a person's decision who lives & dies – only God's. You will regret it.

Based on your own experience, what would you tell a court that believes abortion should be legal? It's WRONG!

Murder should be illegal no matter what age, size or development of an individual life. If its illegal to kill a baby after birth, then it should be illegal before birth. It's still the same life. Humans should not have legal access to abortion. Look at your own child or someone else's & imagine killing them before they had a chance at life.

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[000102]

AFFIDAVIT

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The State of Ohio

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Suzanne M. Bishop

* * *

Tell when and where your abortion occurred: Founders Womens Clinic Broadstreet Columbus, Ohio May 03, 1978

* * *

How has your abortion affected you? I am 44 yrs old and childless, I desperately miss what could have been. I *know* in years past I drank, did drugs and many other self-abusive behaviors, to bury my grief and pain. I *know* this led to bulimia, which led to diabetes. My hysterectomy led to osteoporosis. Would you like to read what I have written over the years?

* * *

Based on your own experiences, what would you tell a woman considering abortion? DO NOT DO IT! There are alternatives. You cannot fathom the long term consequences

when the reality sets in and you realize you are not just unpregnant you ARE the mother of a dead baby. That pain doesn't go away.

Based on your own experiences, what would you tell a court that believes abortion should be legal? Life begins at conception, God says thou shall not kill anyone including babies created in his image. By legalizing abortion every "Judge" carries the blood of the innocent on their hands. Every Judge is as responsible as I am for the outcome of my choice though their guilt is multiplied millions of times over.

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[000125]

AFFIDAVIT

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The State of Delaware

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WILMA BOEHMER

* * *

Tell when and where your abortion occurred: 1970 in Baltimore, Maryland and 1975 in Baltimore, Maryland

* * *

How has your abortion affected you? It is a pain that goes directly to the soul. It never lets go. You might think its gone but it is always there. Anything can trigger it. I had to have a hysterectomy at the age of 28. I had pre-cancer tumors on my ovaries, and I was bleeding all the time. I also had a severe case of endometriosis. Due to the abortion, I

have built a wall around me where even if people tell me that they love me, I cannot feel it. I know God loves me, but I can't feel it.

* * *

Based on your own experiences, what would you tell a woman thinking of having an abortion? I couldn't tell her strong enough not to do it. Hind sight is always 20/20. I would do whatever possible to prevent it from happening. I really feel that carrying all this pain (and I have not told anyone except my husband) has affected me mentally, emotionally, and physically all of my life and I am to the point where I am disabled.

Based on your own experience, what would you tell a court that believes abortion should be legal? It is definitely not OK with God. No matter what age or weeks the child is, it is murder and you feel like you have committed murder. I have gone over the ten commandments and have broken everyone of them.

* * *

[000133]

AFFIDAVIT

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The State of Texas

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Tammy Boyd

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Tell approximately when and where your abortion occurred: 1984 Routh Street Women's Clinic

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How has your abortion affected you? For many years I feel like I just blocked it out or never came to terms with what had happened. One day on a web site I saw pictures or graphs showing a partial abortion and I just wept for so long. Even though I had not had this procedure I know at that moment I had lost something very precious. I gave my baby a name and prayed for forgiveness for my part in it all. The memories aren't what they use to be but I would love to go back and change the ending if it would not change the wonderful life I have now.

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Based on your own experiences, what would you tell a woman thinking of having an abortion? There are only regrets that come along with it, if the people at the clinics cared for you they would tell you of all the risks both emotionally & physically. I would rather wonder about how a child is growing up than wondering what might have been.

Based on your own experience, what would you tell a court that believes abortion should be legal? Aside from being cruel & unusual, if we are a protector of life, liberty and pursuit of happiness, we should babies to live to pursue these things.

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[000143]

AFFIDAVIT

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The State of MS

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M. J. B.

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Tell when and where your abortion occurred: Memphis, TN

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How has your abortion affected you? negatively, depression, very severe, heavy bleeding every two weeks for years.

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Based on your own experiences, what would you tell a woman considering having an abortion? Don't do it

Based on your own experience, what would you tell a court that believes abortion should be legal? They are crazy, and don't realize it is morally wrong young teens can get an abortion with out parents knowing, abortion affects the whole family & society, if an unborn child's life is worth nothing why is anyone else's.

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[000155]

AFFIDAVIT

The State of Indiana

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Katrina L. Brummett

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Tell approximately when and where your abortion occurred: My first abortion was in 1976. The abortion was performed by an OBGYN in the Bloomington, IN hospital. The second abortion was in 1977 and was performed at a Planned Parenthood Clinic in Indianapolis, IN.

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How has your abortion affected you? Thankfully, to my knowledge, I have not had any physical consequences to my abortions. However, I suffered tremendously on an emotional and spiritual level for many years. I dealt with my abortion decisions by becoming emotionally numb, and eventually became incapable of attachment even in my relationships with my husband and my two daughters. I had violated my personal moral standards and therefore felt worthless, tainted, unworthy. I continued to make bad decisions that hurt not just myself, but my family, in an effort to escape the guilt and emptiness.

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Based on your own experiences, what would you tell a woman considering an abortion? Abortion is not an "easy" way to erase poor choices or to avoid unwanted consequences. The unfortunate truth of abortion is that we don't get to determine how this decision will effect us, or if in fact it effects us at all. When you are facing an "unwanted" pregnancy, *all* the options are difficult, the truth is **there is no "easy way out."** So please don't make a decision for

abortion believing that it's a quick, easy fix. There are *better* options that won't leave you regretting for a lifetime a decision that you cannot possibly take back. There is tremendous potential for serious physical, emotional and spiritual harm, consequences that can scar you for a lifetime. You do have other options and there are many people, churches and organizations that are willing to help and support you and your family in this decision.

[000179]

Based on your own experience, what would you tell a court that believes abortion should be legal? The information the courts used in order to create the law and uphold the law since its formation is based on lies and half-truths. The two women whose life situations these laws were based, now see the truth about the harmful effects of abortion and they themselves are fighting to reverse the law, that should speak louder than anything. There are numerous statements of "fact" that have been used to support abortion as a legal right. One of the points of persuasion for legalized abortion has been "women have the right to make their own choices regarding their health and future." I completely agree with this statement. But it is also my right within that context to be told the truth about abortion, all of the truth, and nothing but the truth. I should be able to confidently rely on the abortion provider to give me that truth, no matter how my ultimate decision effects the provider. Why, when a woman is given an ultrasound before her procedure, do they turn away the monitor so as to not allow the woman to view what in the context of a "wanted" pregnancy the women sees as her baby; this "blob of tissue" has hands, legs, eyes, a functioning brain and heart? Why are the potential physical and emotional risks minimized if talked of at all? You have no idea the

emotional pain and turmoil I experienced when I saw during my "wanted" pregnancy what that "blob of tissue" looked like at 6-8 weeks, when I terminated. **I have the right to know and to make an informed decision that I can live with for a lifetime, this is my most basic human right.** The law was supposedly created to protect women, their rights and health. Abortion in no way protected me physically, emotionally, or spiritually, in fact that one decision nearly destroyed my life. It is the court's obligation to hear all the facts, even those that are contrary to the "voices of power."

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[000180]

AFFIDAVIT

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The State of California

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Elizabeth Campbell

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Tell approximately when and where your abortion occurred: I have had multiple all through Planned Parenthood.

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How has your abortion affected you? I suffered from depression, migraine headaches – low self esteem – no self worth – was in an emotionally abusive relationship for 11 years until my divorce. I have a very difficult time trusting

people and have very few friends. Overweight = thin = abortions

Over protective parent to the point of smothering my children.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? Not to do it!! The ramifications of the "quick fix" will last with you a lifetime!! The guilt, grief, shame to deal with will be tougher to deal with than continuing w/a pregnancy & going through adoption.

Based on your own experience, what would you tell a court that believes abortion should be legal? This is a very devastating experience and one that the federal system should not continue to keep legalized – too much damage is happening to women with the "legalized procedure."

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[000196]

AFFIDAVIT

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The State of Georgia

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S.C.

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Tell when and where your abortion occurred: April 1994 – Atlanta, GA

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How has your abortion affected you? I was told of the medical ramifications that an abortion could cause – but not the emotional. Intense guilt & depression has plagued me since my abortion until I received "Post Abortion" counseling.

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Based on your own experiences, what would you tell a woman considering an abortion? I would tell her that even though she may not have planned on this child God did. I would pray with her & urge her to give her baby a chance at life – a chance that I denied my child.

Based on your own experience, what would you tell a court that believes abortion should be legal? I would tell them that life begins at conception and not birth. If I was only carrying a "clump of tissues", why was my heart ripped out after the procedure was performed? Every thread of my being deep down within my self was telling me I had just murdered my *child*.

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[000197]

AFFIDAVIT

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The State of TEXAS

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D.K.C.

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Tell when and where your abortion occurred: AUSTIN, TEXAS

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How has your abortion affected you? I HEARD BABIES CRYING AND HAD A REOCCURING DREAM FOR A LITTLE MORE THAN A YEAR. I WOULDN'T INTERACT WITH ANY MAN FOR QUITE A WHILE.

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Based on your own experiences, what would you tell a woman considering an abortion? GET HELP – OUTSIDE OF YOUR FAMILY – FOR YOURSELF AND YOUR FAMILY. SEEK CHRISTIAN GUIDANCE – MAKE SURE YOU HAVE ALL THE INFORMATION ON ALL OF YOUR OPTIONS!

Based on your own experience, what would you tell a court that believes abortion should be legal? THAT BABIES BLOOD IS AS MUCH ON THEIR HANDS AS IT IS MY OWN! I WOULDN'T HAVE CONSIDERED ANYTHING ILLEGAL.

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[000205]

AFFIDAVIT

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The State of Indiana

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P.C.

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Tell when and where your abortion occurred: (4 abortions) 1974, 1978, 1981, 1985, Planned Parenthood Pomona, Calif.

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How has your abortion affected you? Today I am married to my 2nd husband. A marriage brought together by God

(we lived 2000 miles apart when we met and courted) I believe due to my actions, it is the sole reason that today I cannot have children. On my 2 year anniversary I was in the hospital having a total hysterectomy.

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Based on your own experiences, what would you tell a woman considering an abortion? Listen to her inner self. Deep inside when I was pregnant I did want to have my baby I would tell her – OVERCOME FEAR of the unknown and replace her fear with faith GET support! GET TO KNOW GOD

Based on your own experience, what would you tell a court that believes abortion should be legal? I would ask WHY? WHAT DO THEY GAIN FROM LEGALIZING ABORTION MONEY??? I WOULD ASK THEM TO WATCH A VIDEO OF A FETUS experiencing abortion and then ask them to imagine that was their daughter or son or grandchild they just "illiminated" and it was their daughter on that table.

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[000204]

AFFIDAVIT

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The State of Mississippi

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Wendy Chesnut

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Tell approximately when and where your abortion occurred: 2/84, Santa Cruz, California

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How has your abortion affected you? I realized several years later what a huge mistake it was at the time I was very sad, but had noone to discuss it with, so I didn't face it at all. I remained very disconnected from the event in my life. Once I took responsibility for killing my baby – and actually began to think of the "pregnancy" as a baby I was able to move on. Now I have great compassion for women in an unplanned pregnancy & want to be sure they truly have all the facts in order to have a true choice.

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Based on your own experiences, what would you tell a woman considering an abortion? I would tell her factual information about her baby & its developement. I would tell her she most likely will regret an abortion decision either right away or in the future. I would give her all of her options.

Based on your own experience, what would you tell a court that believes abortion should be legal? I would tell them that regardless of what the law is – women do not receive full information in order to make a "choice." I would tell them that the $$ made in the abortion clinics is what the "choice" people are really after. I would tell them that statistics show & prove that abortion hurts women. I would tell them the pregnant in the first place not – murder as an after thought to hide the mistakes made.

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[000233]

AFFIDAVIT

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The State of California

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Amy M. Childers

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Tell approximately when and where your abortion occurred: Vallejo California, (1) Kaiser (2) Planned Parenthood.

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How has your abortion affected you? TORMENT – I could not forsee the horrible consequences in my life, my heart, my emotions, and my childs life. I feel like I assisted in murder of someone innocent and was never held responsible. I was treated as if this was a simple tooth extraction. As if I had no face nor did my unborn child. The guilt and depth of the loss I have experienced is unexpressable. I have reached some healing but I'm never able to totally recieve rest inside. My daughter asks "why don't I have any brothers or sisters and when will I?" These things stir up my pain. The loss is great and undeniable.

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Based on your own experiences, what would you tell a woman considering an abortion? The truth – maybe you can't see or imagine what will happen in an abortion – But you can literally feel your child torn into death from your heart. If you deny these feelings in the beginning this will be an emotional burden heavier than raising a child.

Based on your own experience, what would you tell a court that believes abortion should be legal? Murder is illegal so

why if a woman births a premature child at 24 weeks gestation – why do we fight to save the baby's life and call it a child if at the same time we can dismember a baby in the womb of the same gestation? Women are ill informed of the emotional consequences of abortion.

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[000234]

AFFIDAVIT

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The State of Colorado

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B.C.

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Tell approximately when and where your abortion occurred: Dec 10, 1980/Vail, Colorado

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How has your abortion affected you? Post trauma with depression, anger, guilt, despair, and infection. I would be lost as a murdurer without hope if the Lord had not forgiven & loved me I would have taken my own life. I will spend the rest of my life helping women understand the truth about abortion and support them in their unplanned pregnancy

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Based on your own experiences, what would you tell a woman considering an abortion? It isn't the easy fix they

say it is. God will make a way where there seems to be no way. I will help you in any way I can to have your baby, a special child for the world.

Based on your own experience, what would you tell a court that believes abortion should be legal? Please stop the murder of the future citizens of our country. Life is precious and death of my child is not reversable. Our future is our children.

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[000235]

AFFIDAVIT

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The State of Washington

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Elizabeth Cleigh

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[000241]

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I had an abortion in March 1982, at a Planned Parenthood abortion clinic in Hollywood, California.

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Immediately after the abortion I felt a sense of relief. But because I have had a lifetime of "stuffing" my emotions I had no awareness of the serious trauma that [000242] had just occurred. I had just committed murder. Even though my mind could not accept that my spirit and body knew exactly what had just happened, and they did every thing they could to get ~~through~~ me to see the truth. God places a

conscience in each one of us whether we choose to submit to it or not. And I had chosen not to see the truth.

* * *

I would tell a woman seeking abortion to not even go near a Planned Parenthood Clinic. They DO NOT GIVE YOU A CHOICE!!! To seek help at a Crisis Pregnancy Center where they can truly give you a wide range of choices and options and support along every step of the way. You may not experience any affects from the abortion right away but the pain is still there whether you want to confront it or not and your day will come like mind did whether its here on earth or when you have taken your last breath and face your Heavenly Father to give an accounting of your life. **You will eventually one way or another face the truth about your abortion!**

I have pondered greatly over this question. I believe abortion should not be considered a RIGHT. It is what it is, murder. I believe abortion cannot be abolished unless it is fully recognized as murder on all levels of society and if CHOICE in the fullest extent of the word is established in medical clinics; and pregnancy and LIFE support is offered rather than bondage and death. Pregnant teens and women aren't given a choice when they enter a Planned Parenthood Clinic. Their only option is abortion! One does not have to look far to see what the original intention of Planned Parenthood was and still is, it has never been to empower women but to demean them, especially women of color. The original [000243] intention was to legalize genocide, to eliminate blacks and other minorities from our culture! But now that our culture is brainwashed to think abortion is a Right of all women, it

will never be outlawed. If the Black women of America knew the truth they would be outraged.

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[000244]

AFFIDAVIT

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The State of Texas

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Terrie Coleman

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Tell approximately when and where your abortion occurred: October 1978, Fort Worth, TX @ a Planned Parenthood Clinic

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How has your abortion affected you? My abortion so traumatized me that it was 10 years before I could even talk about it. Now – 23 years later – I cannot even think about what an awful thing I did to my own baby without crying. I have been severely depressed at times & often overwhelmed with guilt and fear. It has always been a struggle for me to not think that God would "take" my other children as punishment for what I had done to that first baby.

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Based on your own experiences, what would you tell a woman considering an abortion? Planned Parenthood does *not* tell you exactly what you are doing to an unborn baby. They NEVER suggest to you the possible emotional scars

this leaves. I can tell you from experience, this is *not* a painless way out of a "bad" situation.

Based on your own experience, what would you tell a court that believes abortion should be legal? Killing an innocent unborn baby to hide the deeds of his/her parents should ***never*** be a choice, an option. To allow people to profit by the murder of innocent, unborn children for the sake of "convenience" is shameful and should be outlawed.

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[000247]

AFFIDAVIT

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The State of Alabama

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RAC

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Tell when and where your abortion occurred: San Antonio, TX 1984.

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How has your abortion affected you? Severe depression, crying I don't want to be around babies because I am ashamed of what I did.

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Based on your own experiences, what would you tell a woman considering an abortion? I would tell her the hell I have been through and that they people who represent the clinics either lie or withold the truth to complete the abortion & they don't care about her or the baby.

Based on your own experience, what would you tell a court that believes abortion should be legal? They are wrong life begins upon conception and it it wrong to change the definition of conception to suit their own agenda. They are the first in the chain of killers

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[000261]

AFFIDAVIT

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The State of Kentucky

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Nicole W. Cooley

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Tell when and where your abortion occurred: April 15/16, 1994 in Washington DC. I believe the name of the clinic was "Washington Surgi-Center" – it has since closed.

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How has your abortion affected you? Gyn/ob exams are extremely stressful – painful as well for years. Marital intimacy difficult. Difficulty in childbirth. Frequent insomnia. Abortion compounded the pain of my rape making healing much more difficult.

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Based on your own experiences, what would you tell a woman thinking of having an abortion? Abortion is so devastating that I would never do it again – even at the cost of my own life. The abortion procedure is inhumane – pets

are treated far better. This is a decision you will live with the rest of your life – make a choice you won't regret.

Based on your own experience, what would you tell a court that believes abortion should be legal? Abortion doesn't "protect" women – it destroys them by allowing them to go against their inherent nature (to protect children). By keeping abortion legal, women are duped into believing it is safe, morally permissable and inevitable. Abortion is none of these – it is emotionally/physically destructive, immoral, and in the long run, the harder "choice."

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[000271]

AFFIDAVIT

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The State of MS

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L M C

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Tell when and where your abortion occurred: Memphis, TN

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How has your abortion affected you? I experienced depression, crying for unknown reasons, suicidal thoughts.

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Based on your own experiences, what would you tell a woman considering an abortion? It may seem right at the time or the only thing you can do, or it is okay or you're right but the emotional pain you will feel later will be unbearable.

Based on your own experience, what would you tell a court that believes abortion should be legal? That women deserve to know the truth! That abortion kills babies, that it hurts women physically & emotionally! That it does not end when you leave the clinic. There is such a thing as Post Abortion Syndrome and I had it. I wonder how many women have tried to commit suicide over their abortion. I wonder how many have succeeded! Most of all I wonder if you even care!

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[000296]

AFFIDAVIT

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The State of ARKANSAS

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M A C

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Tell approximately when and where your abortion occurred: in 1983 Beaumont, Texas Womens Care Clinic

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How has your abortion affected you? Emotionally – Physically. I was 25 when I had my abortion. I'm 42 now and there is not a day goes by I don't think about how I murdered my baby.

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Based on your own experiences, what would you tell a woman thinking about an abortion? If you ever want to have more than one child, if you want to save your sanity, there is

a lot of pain and blood, unbelievable pain, depression, grief! Lots of grief.

Based on your own experience, what would you tell a court that believes abortion should be legal? Go have one! if you want a nation of emotionally, physically, disturbed women go ahead. I'm pleading with you please stop this butchering of women and their baby's. Because of this procedure, I cannot have anymore children. I thank god I have one son.

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M A C

[000315]

AFFIDAVIT

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The State of Texas

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Terry Daly

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Tell when and where your abortion occurred: Lakewood, Colorado May, 1980

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How has your abortion affected you? I wanted to replace the baby (get pregnant again) right after my abortion. I have gone through several deep depressions. It caused problems in my marriage and my relationship with my mother.

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Based on your own experiences, what would you tell a woman considering an abortion? Think of yourself holding a precious innocent newborn baby. Someone snatched it from

you and murdered it in front of you. You would be mortified. That is how you are going to feel after your abortion. Only you are the murderer. The sickening guilt is unbelievable!

Based on your own experience, what would you tell a court that believes abortion should be legal? Now that we have the technology to see inside the womb, and we know beyond a doubt that we are indeed stopping a beating heart, how can we continue to allow this avenue of murder to be legal.

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[000328]

AFFIDAVIT

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The State of New Mexico

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Tell approximately when and where your abortion occurred: 1976 Santa Fe, NM

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How has your abortion affected you? Once I was married, I became pregnant and had overwhelming guilt. I was sure I'd loose my baby as a punishment for aborting my first baby. Even now I am ashamed and angry that I was not fully informed. I don't believe my parents were fully informed either. I often wonder if it was a boy or girl.

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Based on your own experiences, what would you tell a woman considering an abortion? To research what she's doing. It is a dangerous surgical procedure for her that can lead to an increased risk in breast cancer. She needs to look at ultrasounds of developing babies. They are humans; with human baby attributes. At some point you will feel guilty of murder

Based on your own experience, what would you tell a court that believes abortion should be legal? That it's murder. It's the destruction of a human life. In ancient Roman history the unwanted babies in jars to die & leave them outside. It's a horrid time in our history. How are we any different? We leave our unwanted babies in buckets & dumpsters. It's still infantacide. I'm a nurse and I have to have informed consent for procedures. I know young girls are not giving informed consent.

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[000346]

AFFIDAVIT

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The State of North Carolina

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Cheryl A. Derstine

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Tell approximately when and where your abortion occurred: 1981 I was 16 yrs. old. The abortion occurred at a women's clinic in Allentown Pennsylvania.

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How has your abortion affected you? I became physically ill shortly after my abortion with severe back and abdominal pain, high fever and seizures. Emotionally and spiritually it destroyed my life and took 21 years for me to be emotionally and spiritually healed.

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Based on your own experiences, what would you tell a woman considering an abortion? Please don't have an abortion. Abortion is the exact opposite of what women were and are created to do. Motherhood is not a curse but living in unforgiveness and pain from aborting your own baby is.

Based on your own experience, what would you tell a court that believes abortion should be legal? Abortion is murder. Somehow along the way we've been told at conception and the early weeks its not really life – not really a baby – that simply not true. At conception THERE IS LIFE. PRO CHOICE IS PRO DEATH. Murder is not accepted in a court room – murder is an act of a criminal , so . . . abortion needs to be outlawed.

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[000367]

AFFIDAVIT

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The State of Texas

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Shawn Doctor

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Tell when and where your abortion occurred: At New Women's Clinic (San Pedro Rd) in San Antonio –I believe it was Wednesday the first week in July 1988.

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How has your abortion affected you? depression, loss of self-esteem (which eventually led to an eating disorder), before redemption in Christ – constant (almost daily) thought about the tragic manner in which my baby was killed, and extreme guilt.

* * *

Based on your own experiences, what would you tell a woman thinking of having an abortion? Don't do it. It will be the worst mistake in your life. As difficult and painful as your situation may be nothing compares to the agony of killing you child. Don't ignore the subtle voice from within that tells you it's wrong. That is the voice of God pleading with you to keep your child alive.

Based on your own experience, what would you tell a court that believes abortion should be legal? This so-called choice should never even be an option. The law tells us that we MUST wear seat belts, yet we can murder our babies within our very womb? Something is tragically wrong with our society. If abortion was illegal in 1988, there would be another happy twelve year old living today!

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[000373]

AFFIDAVIT

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The State of New Jersey

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Teresa Dziadal

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Tell approximately when and where your abortion occurred: Hackensack Medical Cntr August 4, 1988

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How has your abortion affected you? It replays in my mind 24 hrs a day. Seeing children, pregnant women hurts. I've lost my best friend because of my child. I don't trust doctors (being a diabetic that's rough) I don't trust hospitals. I cry every day. I have no forgiveness for myself – I feel that I should have been able to stop them – since telling them to stop didn't matter

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Based on your own experiences, what would you tell a woman considering an abortion? That it's a child that's being terminated, not a pregnancy. That there are alternatives to having an abortion and that a man's rights should never outweigh a woman's rights. Proabortionists usually have never had to suffer one themselves.

Based on your own experience, what would you tell a court that believes abortion should be legal? I was always a firm believer in a woman's rights -- until I found out the hard way that pro choice only means proabortion. It should be

proabortion and anti-abortion; not prochoice vs. pro life. No one cared about my choice, no one cared by my rights.

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[000393]

AFFIDAVIT

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The State of Texas

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Dawn M. Erickson

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Tell approximately when and where your abortion occurred: Spring 1974, El Paso, TX Piedres St.

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How has your abortion affected you? For 26 years I never talked about my abortion even when abortion was brought up in conversation. For most of my adult life and late teens I abused alcohol, and for 10 years I was addicted to drugs, and I believe I took these actions to try and kill the pain of my secret murder of my child by abortion. My choices in my social life were not very picky because I tried to fill my pain with what I thought was love and it turned out to be lust, and the men left or I left due to physical abuse. At the age of 23 I gave a son up for adoption because I was so messed up. I couldn't raise him, and at 33 I kept my son. None of these events could replace the pain of the loss of my child.

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Based on your own experiences, what would you tell a woman considering an abortion? Abortion is murder. It is something you cannot ever undo. This could be your only child. If they were parents and they have children, and if they had to chose which child they would kill, what niece or nephew would they kill? It's a baby.

Based on your own experience, what would you tell a court that believes abortion should be legal? God creates life in the womb, and abortion is an act against God. Educate by telling details of some techniques of abortion. Abortion is not just a physical operation with risks . . . even death, but it can affect a woman emotionally and psychologically for years and even for life.

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[000410]

AFFIDAVIT

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The State of Arkansas

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Jerrell Ann Farmer

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Tell approximately when and where your abortion occurred: Los Angeles California

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How has your abortion affected you? I am 47 years old. I have only been pregnant once since my abortion and I had a miscarriage. How sad – I would have been a great mom. I often think of how old my child would be. I believe my baby

was a boy. I wonder what he would have become. I think of how close we could have been. It is a profound loss.

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Based on your own experiences, what would you tell a woman considering an abortion? There are other options. Better options. Ones that leave you healthy physically and emotionally. Options that do not leave you searching for a means of redemption.

Based on your own experience, what would you tell a court that believes abortion should be legal? Killing is a crime and we need to get our heads out of the sand. A fetus is an unborn child at any stage. To believe different is to believe a lie. All human life is created in his image. No court has the authority to say different and not suffer the consequences as a Nation.

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[000419]

AFFIDAVIT

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The State of California

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K.G.

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Tell approximately when and where your abortion occurred: April 25, 1994/Dr Ryan Anderson's office in Danville, CA

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How has your abortion affected you? It was almost nine years ago and there is not a day that goes by that I don't

think about it. About a month after, I started having severe panic attacks because I felt like something bad would happen to me because I did something so horrible. With the birth of each of my three children, I suffer from extreme guilt and sadness about the baby that I didn't give a chance at life.

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Based on your own experiences, what would you tell a woman considering an abortion? I would tell them that life begins at conception. If they are young like I was there are options like adoption or people that will help you take care of the baby. mostly I would stress that it was a BABY not a blob, or cells, or product of conception like I was told.

Based on your own experience, what would you tell a court that believes abortion should be legal? Something that involves taking the life of a child to be legal is absolutely crazy. God gives us our children, it is not up to us which ones stay and which ones go. It is up to him. How sad it is for all of the babies that God wanted to give life to and they were destroyed. Secondly, the mothers can suffer for the rest of their life.

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[000474]

AFFIDAVIT

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The State of Texas

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Janice L. Gilliland

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Tell approximately when and where your abortion occurred: Salinas, CA –Planned Parenthood 1986 Spring or Summer

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How has your abortion affected you? I feel this abortion affected me physically, mentally and emotionally. I was already the mother of 3 children and believed in life and loved being pregnant. Because of the fear I lived under perpetrated by my ex-husband, I chose to have the abortion to avoid anymore of his wrath and terror. This abortion has affected me emotionally to this day, as I am still dealing with the loss. My health also deteriorated afterwards.

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Based on your own experiences, what would you tell a woman considering an abortion? Never, never take the life of your child, because you'll always wonder what is it's potential would have been and you'll always live with the guilt and sadness of it. At least with the option of adoption, you chose life for your child and opportunity.

Based on your own experience, what would you tell a court that believes abortion should be legal? That, even at 8 weeks when I had my abortion, I new there was life in me. That making murder legal still does not make it right. Abortion is a legal convenience that is not worth the consequences; physically, emotionally, or mentally.

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[000487]

AFFIDAVIT

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The State of MN

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Beverly A. Green

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Tell approximately when and where your abortion occurred: Feb. 1979 Meadowbrook, St. Louis Park

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How has your abortion affected you? I went into a black tunnel for years. Started using drugs, drinking, more promiscuity, very insecure, hated myself – the list goes on. . . .

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Based on your own experiences, what would you tell a woman considering an abortion? It's not a quick and easy solution. Don't do it! It will haunt you the rest of your life. Two wrongs won't make a right. They don't tell you how awful it is and that you will forever morn the loss of your baby.

Based on your own experience, what would you tell a court that believes abortion should be legal? It's not the "illegal" abortions that hurt women – it's abortion. Our constitution should protect the rights of all people – born, old and unborn. Harry Blackman himself stated that they would have a hard time getting the law for abortion if it were proven that the fetus is actually a baby – well in this day and age – that's a "no brainer!"

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[000508]

AFFIDAVIT

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The State of NC

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Gwen E. Gregory

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Tell approximately when and where your abortion occurred: 1978 or 1979 – Ft. Myers, FL

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How has your abortion affected you? Years of guilt, mental and emotional distress. Fears if I could have a normal child. Especially during my 2 subsequent pregnancies, keeping it silent from family and friends, shame

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Based on your own experiences, what would you tell a woman considering an abortion? Not to do it. Look for alternatives. Raise yourself, adoption assistance

Based on your own experience, what would you tell a court that believes abortion should be legal? It is taking a life. It can affect you the rest of your life. There are alternatives.It is too easy a choice, uninformed, under pressure it is very painful process.

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[000514]

AFFIDAVIT

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The State of Florida

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R.G.

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Tell approximately when and where your abortion occurred: Delaware County, PA 1987 and 1989

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How has your abortion affected you? For years afterward I suffered from unexplained guilt and shame. I could not except what I had done and wished I could have the opportunity to change my decision. I would cry over the loss. And it is so difficult to heal because even though "Choice" is excepted, to have had an abortion is tabu. How can that be? Thankfully I finally found peace thru God's love & foregiveness.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? Even though it seems like an easy out, the pain will be with you for the rest of your life.

Based on your own experience, what would you tell a court that believes abortion should be legal? It is murder pain and simple. Without the fetus there would not be a human life. No one should be allowed to murder anyone, especially out of convenience of choice. Life is valuable.

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[000521]

AFFIDAVIT

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The State of Tennessee

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M H

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Tell approximately when and where your abortion occurred: 1989 – Planned Parenthood Nashville, TN 1990 – Dr. Jill Chambers Nashville, TN

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How has your abortion affected you? I had 10 years of depression, anxiety, and panic attacks that I had trouble understanding. I did not understand what was causing me to be literally ill. I eventually learned of Post-Abortion Syndrome. I was apprehensive at first but agreed to see a councelor. Through this process I discovered that I was so full of guilt, shame, regret, unforgiveness, and sadness that I will unable to cope with day to day life. Those 10 years of my life were spent in anguish due to a decision that I had made based upon mis information and untruths.

Based on your own experiences, what would you tell a woman considering an abortion? I would make sure that she understood the facts of abortion and the procedures used and I would make sure she understood the risks involved physically and mentally. I would make sure she understood that there is such a thing as Post Abortion Syndrome and what that means for her. I would share my story with her.

Based on your own experience, what would you tell a court that believes abortion should be legal? I would tell the court what my experience with abortion has been like and explain to them that I made a decision without understanding truth. I would hope that my story would help explain to them what the effects of abortion can do to a person both physically and mentally. Not to mention what it does to an unborn child. It is amazing to me that such a clearly immoral and dangerous procedure could actually be permitted. The well being of so many is in jeopardy everytime a "choice" is made.

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[000529]

AFFIDAVIT

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The State of California

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N. E. H.

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Tell when and where your abortion occurred: Los Angeles January, 1971 UCLA referred me to a clinic in Valley

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How has your abortion affected you? realized I had done something deeply wrong – have gone to confession, gotten counseling (post-abortive) but the hardest part is forgiving yourself

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Based on your own experiences, what would you tell a woman considering an abortion? get all the facts – including the positives on choosing life & how women regret abortion but they don't regret having children. If you really can't parent there are plenty of people crying for the opportunity.

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Based on your own experience, what would you tell a court that believes abortion should be legal? If you understood a fraction of the pain & suffering abortion is causing women (& this society) *and* men you'd have to rethink this "right". Also consider the rights of the 4,000 daily who are denied life

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[000547]

AFFIDAVIT

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The State of Oregon

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Tinya E. Harper

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Tell when and where your abortion occurred: Tucson Medical Center – Tucson, AZ March 1976

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How has your abortion affected you? I experienced many years of guilt and sadness, and longing for my child, as I learned exactly what abortion is, the taking of a human

life. My child would be 26 yrs old. Because it was legalized, I thought it was O.K.

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Based on your own experiences, what would you tell a woman considering an abortion? That if your pregnant have the baby, you can do it, you will never regret. If you go through an abortion, as you realize it was your baby, you will always hurt, and regret.

Based on your own experience, what would you tell a court that believes abortion should be legal? Just because it is legal doesn't mean it is O.K. and safe. A woman has a choice to be with a man, or not, a choice to have sex, or not, and a choice to use birth control (like condoms, etc.) after that its not a choice it's a child, abortion is murder.

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[000551]

AFFIDAVIT

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The State of Arizona

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Karen Ruth Hartman

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Tell when and where your abortion occurred: Nov. 12, 1988 – York, PA

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How has your abortion affected you? First, I experience relief, then deep grief, guilt, nightmares, anger, saddness,

a feeling of worthlessness, depression, crying. I felt alone and lonely, for I could tell no one. I was silent, but wanted to speak out, but who would listen after all it was my choice. Who would understand. Only through God's love did I find relief.

Based on your own experiences, what would you tell a woman considering an abortion? I would inform her about the 'TRUTH' of abortion. The emotional, consequences & the physical. Plus that the life within her is a baby, abortion kills that life, nothing will bring that life back if abortion is chosen.

Based on your own experience, what would you tell a court that believes abortion should be legal? I chose abortion not because I wanted to end a life, rather in my mind during this crisis I kept thinking "It's legal, it must be okay." If it was illegal I would not have considered it nor would that option been considered by myself or my husband.

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[000562]

AFFIDAVIT

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The State of CO

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S H

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Tell when and where your abortion occurred: Fall (Oct) 1978 – Mpls, MN

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How has your abortion affected you? Following the abortion I became severely depressed, self destructive and suicidal. The guilt from my decision overwhelmed me. I now have an educated opinion of abortion and have a heart for women facing unplanned pregnancies.

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Based on your own experiences, what would you tell a woman considering an abortion? I would share my own experience with abortion, tell her that I know she is scared & at a major turning point in her life but that an abortion is not in her's or her child's best interest.

Based on your own experience, what would you tell a court that believes abortion should be legal? That abortion is not just a word, this is a living human being at risk of being surgically removed from the womb limb by limb. This person has a right to life like any others. We as human beings are *not* God & should not have the right to decide whether another should live or die.

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[000575]

AFFIDAVIT

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The State of Texas

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Dianne L. Hensley

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Tell when and where your abortion occurred: 10-31-72: Presbyterian Hospital, Albuquerque, NM

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How has your abortion affected you? For ten years I didn't think it had had any impact. However, w/ hindsight, I am sure it contributed to the breakup of the marriage & to a very self-destructive cycle of behavior for several years following.

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Based on your own experiences, what would you tell a woman considering an abortion? Don't – your life has already been changed forever, your choice is how, not if, you will be changed forever. Had I not found forgiveness in Christ & a constructive use for the experience, I'm not sure I could carry the burden.

Based on your own experience, what would you tell a court that believes abortion should be legal? I believe the meltdown of our culture – kids killing kids, etc. – is directly related to the message we send by legalizing abortion on demand. Our civilization depends on re-establishing a respect for life.

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[000587]

AFFIDAVIT

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The State of Florida

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K. M. H

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Tell approximately when and where your abortion occurred: 1979 San Diego CA 1982 OHIO

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How has your abortion affected you? I terribly regret it. The guilt I have sometimes is unbearable. I consider it the biggest mistake of my life. I can't begin to explain the heartache I have when I think of my other children that I never got to know. I have a grandson now and the heartache is even worse – I'm thankful for a merciful forgiving God – without Him I couldn't live with myself.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? Please don't!! Find any other alternative – Its something you have to live with for the rest of your life! And it hurts!!

Based on your own experience, what would you tell a court that believes abortion should be legal? Abortion is murder – And *no one* has the right to take the life of another. If abortion clinics were not available I never would have killed my children – its just too easy.

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[000599]

AFFIDAVIT

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The State of Georgia

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Melissa Hodges

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Tell approximately when and where your abortion occurred: Atlanta, GA July 27, 1976

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How has your abortion affected you? I was 16 at the time and thought it would end that day. It changed the way I felt about myself. My self esteem crumbled which affected the choices I subsequently made. My boyfriend went on his own way which compounded my self worth. I started drinking, did not choose college which I had always planned to do, and it affected my future choice in partners. It ultimately cost me my marriage many years later.

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Based on your own experiences, what would you tell a woman considering an abortion? Run the otherway! Abortion destroys 2 lives – one is definitely the child, but the mother dies slowly from the inside out as she(me) struggles to deal with the pain of the loss, grief, despair, and intense sadness over the choice to abort.

Based on your own experience, what would you tell a court that believes abortion should be legal? Like Satan convinced Adam & Eve that eating the fruit was okay and they bought the lie, as a nation, so have we. My child had a beating heart and since I'm a human – the child was human; therefore my choice stopped that beating heart.

Taking a life regardless of its location is wrong – inherently wrong; The child's pain is over in a short time. Mothers continue to suffer for a lifetime, and like cancer, invades all areas of relationships with others & her own well being.

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[000600]

AFFIDAVIT

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The State of Virginia

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B H

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Tell approximately when and where your abortion occurred: Late January of 2000 at The Womens Clinic on the Boulivard in Richmond

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How has your abortion affected you? It has crushed me with depression, remorse and guilt. I am unable to forgive myself and it is hard for me to believe that God can forgive me. I have a 10 month old child now and every day I spend with her, I hate the fact that I killed my helpless, defensless baby. I live in constant fear that my daughter will be taken from me somehow because I don't deserve a child after what I did. I can't sleep. I have nightmares frequently about my aborted child. I feel loss. I feel I don't deserve anything.

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Based on your own experiences, what would you tell a woman considering an abortion? Your unborn baby deserves a *chance*. A chance to take its first breath to laugh, to love. A child brings joy! Even if you give him/her up for adoption. It will have a chance at life and you will *know* you did the *right* thing w/no regrets. The pain of killing your baby will weigh on you unmercifully forever.

Based on your own experience, what would you tell a court that believes abortion should be legal? I wish with *all my heart* that abortion had been illegal. I would have my child and not all this pain & suffering every day. There is *no* way to know the pain until after you have done the undo-able

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[000611]

AFFIDAVIT

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The State of California

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Deborah C. Howard

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Tell approximately when and where your abortion occurred: 5-1973 San Joaquin Hospital Bakersfield CA

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How has your abortion affected you? Has left me with much regret, however God has forgiven me and I know I will see this child in heaven in 1973 there was no education on life & conception. I honestly thought it was a thing, not a child. If I had known the truth, I would not have

done it. I became very ill for several weeks after & depressed, even though I did not even know the truth

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Based on your own experiences, what would you tell a woman considering an abortion? Not an option this is a human being from conception

Based on your own experience, what would you tell a court that believes abortion should be legal? Look at science, it proves this is a human being. The fact that it is in the woman does not change the truth. It is murder & something better change for the sake of the babies, mothers & this United States.

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[000626]

AFFIDAVIT

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The State of Georgia

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Lynn C. Hurley

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Tell when and where your abortion occurred: Augusta, GA – November 26, 1977 – at a clinic located directly across the street from the Medical College of Georgia.

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How has your abortion affected you? Emotionally & spiritually. 17 years I carried a heavy load of emotional pain, shame & guilt. I was so afraid someone might find out what I had done. I drank & smoked pot to mask emotional pain.

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Based on your own experiences, what would you tell a woman considering an abortion? The guilt, pain, shame, emotional numbing, etc. are much worse and last far longer than the embarrassment you may feel as an unwed mother pregnant for just 9 mos. Give your baby life and you can look back many years from now knowing you did the right thing.

Based on your own experience, what would you tell a court that believes abortion should be legal? It is never OK for a mother to kill her child, no matter what age that child is. In an abortion, not only is a child killed, but a mother is walking around wounded, and will carry the scar for the rest of her life.

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[000642]

AFFIDAVIT

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The State of Texas

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E K. J.

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Tell approximately when and where your abortion occurred: San Antonio.

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How has your abortion affected you? For many years I struggled with tremendous guilt and depression over what I had done. I had realized that I had killed my child. As I went through 5 years of infertility before having my daughter, I wondered if perhaps something had happened during my abortion which would not allow me to ever have children.

The day of the abortion stands out as the loneliest, most grief-filled day I had ever known.

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Based on your own experiences, what would you tell a woman considering an abortion? Women must know that the decision to have an ~~aborit~~ abortion is also a lifelong decision. It is not a quick fix and then done. They must know they are ending a life.

Based on your own experience, what would you tell a court that believes abortion should be legal? That if abortion – or the right to choose – is such a positive act for women, then why are so many women in pain over such a decision? Why are women ashamed, remorseful after having an abortion? Why aren't women told the truth about the aftermath of abortion?

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[000670]

AFFIDAVIT

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The State of Mississippi

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Melinda L. James

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Tell when and where your abortion occurred: September 25, 1990 Jackson, MS

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How has your abortion affected you? I have been afflicted by calamity, grief, and sorrow. My nerves were wracked, my heart broken. My baby cannot grieve or feel sorrow. It is dead. The first time I felt it move was the last time I felt it move. Anti-abortion demonstrators chanted outside the clinic, screaming "don't kill your baby" throughout the whole hellish time. I felt I was trapped in a nightmare. It recurs. Please don't let this happen to any more humans. It is so wrong; it is so painful.

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Based on your own experiences, what would you tell a woman considering an abortion? First of all, repent. Receive Jesus Christ as your Savior! Then fall on your face in worship and praise and call the Holy Spirit to protect you both from the ravening wolves that do seek to devour and destroy you both. Study the Bible daily. Don't even allow the "A" word to run through your mind as an option.

Based on your own experience, what would you tell a court that believes abortion should be legal? I stand as a living example that abortion is destructive to all people involved – especially the child, the mother, and the rest of each

family. Abortion should not be allowed or condoned in any free society. Abortion is an abomination to our Creator and to all creation. Abortion should be illegal at the very least! Just say no. It's on you now.

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[000671]

AFFIDAVIT

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The State of California

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Patricia A. Johnson

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Tell when and where your abortion occurred: Thursday, April 26, 1973, L.A. County, CA

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How has your abortion affected you? "Extreme trauma", "Ruined" my life, the most horrible guilt – these are all things I have felt at times through my life. Basically, I have suffered a very great loss – my own dear child. I regret it more than anything I've ever done. Great remorse and sorrow. It changes you forever. I miss him. He'd be 27 yrs. old.

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Based on your own experiences, what would you tell a woman considering an abortion? I would tell her not to do it and why not. I would share my own personal life story. I would present all available information on pre-born babies

from the day of conception, Read her Psalm 139, give her all information on Post Abortion Syndrome.

Based on your own experience, what would you tell a court that believes abortion should be legal? Post Abortion Syndrome can cause mental & emotional torment, as it did in my case. Prove to them that P.A.S. is REAL! I would show them pictures and videos of pre-born babies at every stage and what is happening at every stage. I would share my pain and grief – it is real. It's murder and it's illogical to treat the pregnancy with the unwritten rule, "If I want it it's a baby, if I don't, then it's not a baby.

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[000686]

AFFIDAVIT

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The State of Pennsylvania

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Kelly L. Kelchner

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Tell approximately when and where your abortion occurred: 4-29-87 Ralph P. Caschetta, M.D. 1561 Long Pond Rd. Rochester New York 14626

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How has your abortion affected you? Afterwards I became self destructive drinking heavily & doing drugs to try and forget what I had done. I got involved in many relationships with men looking for love and fulfillment. I was

riddled with guilt and shame. I wanted to die. I had a hard time keeping jobs afterward, I was lost & confused.

I am greatful to have found healing from my personal relationship with Jesus Christ.

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Based on your own experiences, what would you tell a woman considering an abortion? Don't do it. Killing your own child is a choice you will regret the rest of your life.

Based on your own experience, what would you tell a court that believes abortion should be legal? It did not help me in anyway. I wish I would have never had that choice. Actually it was the only choice planned parenthood gave me. I went for a pregnancy test, found out I was pregnant and they gave me a slip of paper with 3 abortion clinics. That was not really a choice, now was it?

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[000730]

AFFIDAVIT

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The State of Colorado

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Kristen Kelly

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Tell approximately when and where your abortion occurred: January 1989 in Roswell, Georgia

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How has your abortion affected you? I'm 32 years old and will never have children b/c of that abortion. I was very destructive afterwards and now I am married to a man who has children & unable to have more. I feel that I never loved myself enough after that day to think I ever deserved to have children. I am in counseling to deal with this grief. *there is so much more damage – it is hard to recount it all.

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Based on your own experiences, what would you tell a woman considering an abortion? Never to do it, because you grieve the loss of that child EVERYDAY. Even if you are a Christian you also don't think you are good enough to enter heaven, even though Jesus saves us.

Based on your own experience, what would you tell a court that believes abortion should be legal? I would tell that court that they are killing babies and butchering a mothers soul everytime they allow an abortion to happen.

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[000731]

AFFIDAVIT

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The State of Arizona

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Catherine Kimball

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Tell approximately when and where your abortion occurred: 1. Haleiwa, Hawaii 1971; 2. Santa Barbara Ca 1974

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How has your abortion affected you? 1st abortion: I suffered heavy bleeding & very painful uterine cramping with no medical attention even tho I contacted the doctor for help. 2nd abortion: doctor didn't remove the whole baby during procedure so I was called back in a few days for a subsequent DNC to remove the pieces. After I gave birth to my daughter in 1975 I realized with extreme horror what I had done having abortions. I had been robbed of the joy of motherhood for those two babies whose lives I ended. I still weep for those precious lives lost. I sought forgiveness thru salvation in Jesus Christ & God removed the weight of guilt from my heart.

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Based on your own experiences, what would you tell a woman considering an abortion? Life is too precious. Don't do it. It is murder & will bring guilt. Either keep the baby or put the baby up for adoption. The price is too high. There is help available.

Based on your own experience, what would you tell a court that believes abortion should be legal? I wish Roe vs Wade had never been passed then I never would have suffered from abortion. I was young & didn't realize what I was doing and I believe it is the duty of the courts to pass laws that will help protect its citizens.

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[000744]

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AFFIDAVIT

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The State of California

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S C K

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Tell approximately when and where your abortion occurred: 1973 I was 15 yrs old, Somewhere in Garden Grove, Ca.

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How has your abortion affected you? I became severely depressed afterwards. I know after I had the abortion that what had happened was very wrong. I felt so much guilt and I started drinking very heavily on a daily basis & became a drug addict. I spent the rest of my teenage life living in a haze, I was never sober and I tried to commit suicide. I got clean for a while after getting married and made Jesus my Lord & Saviour yet yrs later I couldn't shake the depression so I started drinking heavy again and I made more suicide attempts. I felt so worthless and I hated what I had become, I would tell myself that I was an accident and that I should have never been born. I am sober now & living for Christ, Through the help of a Christian Counselor I was able to forgive myself & my parents & doctor, I know now that I've been forgiven & will one day see my baby in Heaven.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? Please do not kill your baby there are serious consequences and if you are to young please

have your baby and give him or her up for adoption, there are so many couples who desperately want your baby because they can't have any. Please give your baby a future!

Based on your own experience, what would you tell a court that believes abortion should be legal? Abortion is "murder." Abortion not only kills the innocent but it also causes severe and permanent emotional pain for a large majority of women and "I am one of them". "Abortion is just another Hollecust and it must end" May God have mercy on you in that day that you stand before Him!

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[000758]

AFFIDAVIT

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The State of Alabama

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Kathy Madison

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Tell when and where your abortion occurred: 5/29/78 Homewood, Birmingham, Alabama

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How has your abortion affected you? It has almost ruined my life. I have an ongoing deep sadness and huge void in my life that nothing can fill. Deep sense of guilt.

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Based on your own experiences, what would you tell a woman considering an abortion? I would tell her if she cared

about the rest of her life, not to do it, because it would ruin her life and the hurt never goes away.

Based on your own experience, what would you tell a court that believes abortion should be legal? I would have never considered abortion if it had not been legal. My aunt said abortion would not be legal if it was not OK. I was stupid to believe her.

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[000783]

AFFIDAVIT

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The State of California

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Candice Martin

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Tell when and where your abortion occurred: March 1996 San Diego County

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How has your abortion affected you? I have been suicidal, depressed, had extreme anxiety, had nightmares, suffered from greif & self destructive behaviors.

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Based on your own experiences, what would you tell a woman considering an abortion? Not to do it. I would explain that the effects of abortion reach into every aspect of your life and fester, making every plan & dream die along with your child.

Based on your own experience, what would you tell a court that believes abortion should be legal? I would tell them that I was raped & therefore "justified" in my abortion, but it didn't change a thing. I still suffered because I was led to believe that taking my child's life was ok. It was not & I have been living with that for almost five years.

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[000802]

AFFIDAVIT

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The State of Michigan

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Debra Ann Mays

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Tell approximately when and where your abortion occurred: October 1985 in a Women's clinic in Lansing, MI.

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How has your abortion affected you? Initially I was numb and remained in shock from October 1985 until 1989 and I did anything to feel again; I was fighting with my friends more and lost many of them, I became more sexually active – anything to *feel* again. Then when the hurt surfaced I drank alcohol – anything now to cover the pain. Currently, I have gone through a grieving and healing process and there is still not a day that goes by that I don't regret my decision. It is the deepest loss a woman can ever know.

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Based on your own experiences, what would you tell a woman considering an abortion? Abortion may seem like the right answer now but if it is truly the right answer it will always be right so don't hurry with this decision. Think about the physical consequences, the emotional pain of losing your child and the spiritual death you will go through. This is not the right answer for anyone who wants to experience less pain & more freedom.

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Based on your own experience, what would you tell a court that believes abortion should be legal? If abortion had not been legal I would not have been advised the way I was – My child I killed is named "Amber" and I wish the courts and governments would give as much consideration to saving my child as they do issuing "Amber Alerts" across the country to save children currently living. I would have my child today, in my arms or an adoptive mother who wants children so badly, if abortion wasn't legal.

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[000823]

AFFIDAVIT

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The State of OHIO

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Shannon L. McGuire

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Tell approximately when and where your abortion occurred: 1985, Columbus, Ohio, 1989, Columbus, Ohio 1990, Columbus, Ohio

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How has your abortion affected you? Post-Abortion Syndrome – Almost All Psychological Effects and Had to go through Infertility Treatment to find out I was Physically Fine.

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Based on your own experiences, what would you tell a woman considering an abortion? Never Do It! Give Up your Child for Adoption or Parent! Remain Abstinent and you won't have to deal with the consequences of "Sex Before Marriage."

* * *

Based on your own experience, what would you tell a court that believes abortion should be legal? I have seen and experienced more consequences in my life; and pain that only Someone who has experienced Abortion Can Feel. I will give my testimony any time to prevent more abortions from happening in the U.S.

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[000846]

AFFIDAVIT

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The State of California

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P.B.

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Tell approximately when and where your abortion occurred: December 22, 1977. Pregnancy confirmed at a

Planned Parenthood in Bloomington, Illinois; performed at National Health Care Services, Peoria, IL Case #7717

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How has your abortion affected you? Words can in no way describe the deep, profound loss, guilt, – horror of *knowing* that I *killed my baby*, my very own child, and it is legal! I was at an extremely vulnerable time in my life, in a crisis situation and I wasn't given all the information I needed to make an informed decision. (Such as fetal development & emotional repercussions)

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Based on your own experiences, what would you tell a woman considering an abortion? *Don't do it* – Please! I would give her information – details about the child growing inside her. There isn't a day that goes by that I don't think of the person I let the abortionist kill. *This will haunt me the rest of my life*. I now have 2 biological children living & 1 dead to abortion.

Based on your own experience, what would you tell a court that believes abortion should be legal? The laws *must protect* the women and children in these crisis situations – the courts, the clinics, the doctors all let me down when I most needed true compassion and support. It is the antithesis of compassion to allow and assist a woman in killing her child. It's a person, no matter how large or small, or how young or old!

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[000864]

AFFIDAVIT

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The State of TEXAS

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T M

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Tell approximately when and where your abortion occurred: February, 1973 in a hospital only days after it was legal

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How has your abortion affected you? At first I had deep depression. I was very sorry right away & I knew I would never make that mistake again! I became a Christian a few weeks later & my life turned completely into a new direction. However, I carried a deep loss in my heart. After I married and had children, the loss became even greater because the reality that it had been a "real" baby set in. God has given me a wonderful family & brought healing to my heart, but what I did will always be a reality. I can't un-do or change that wrong decision! I did something very wrong. It was not rightfully my choice. One of my children is missing from my life.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? Life is valuable! It is a precious gift. Circumstances change. Children always bring joy & life to us. God has promised provision to those who trust him!

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Based on your own experience, what would you tell a court that believes abortion should be legal? Making it easy, doesn't make it right. If we don't value the life of unborn babies then our society doesn't value life at all. Each one of us was once in our mother's womb. Some of our parents had it rough, they were inconvenienced, too, but they made right choices to be responsible to the gift of life they carried & gave birth!

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[000878]

AFFIDAVIT

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The State of Missouri

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MELANIE L. MILLS

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Tell when and where your abortion occurred: On March 26, 1998, in Granite City, Illinois at Hope Clinic for Women

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How has your abortion affected you? For about six months I was in denial and then I started having emotional problems. I had to attend several counseling sessions, receive post traumatic treatment and extensive psychiatric care and have been hospitalized twice this year for all the emotional distress. I have attempted suicide this year and in June I found out that I have scar tissue and endometriosis.

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Based on your own experiences, what would you tell a woman considering an abortion? Never to have one. It is the worst mistake because you will have to live with it every single day.

Based on your own experience, what would you tell a court that believes abortion should be legal? I would tell them that it is 1970's thinking. Roe v. Wade needs to be overturned. It is barbaric. It is inhumane. The baby is killed and this should not go on in a democratic society. It exploits women.

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[000882]

AFFIDAVIT

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The State of Tenn.

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Robin Montgomery

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Tell approximately when and where your abortion occurred: 1985 High Point, N.C.

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How has your abortion affected you? For starters I felt so guilty and ashamed I considered myself a murderer and unworthy of life. I became disconnected unable to really extend love or have meaningful successful relationships. There were times when I wished I would just stop breathing. Later when I became pregnant I thought that I would lose that child, I thought that God would punish me for

the first baby by taking the second one. I constantly thought about how the child looked, eye color, smell, complexion.

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Based on your own experiences, what would you tell a woman considering an abortion? I would tell her that the baby would be gone in an instant, but the pain, guilt and absolute torture and anguish will only begin.

Based on your own experience, what would you tell a court that believes abortion should be legal? I would tell the court that just because man legalizes an act doesn't make that act morally right. I would also remind them that man can never override the power and authority of God!!

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[000910]

AFFIDAVIT

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The State of Tennessee

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M L M

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Tell approximately when and where your abortion occurred: October 1980, Memphis Center for Reproductive Health

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How has your abortion affected you? Since I had my abortion, nothing in my life has gone right. I have suffered

from depression, an ongoing sense of shame, and a tremendous amount of anger due to the fact that I allowed myself to be coerced into having this awful procedure performed. It has also affected my ability to be a proper mother to my children.

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Based on your own experiences, what would you tell a woman considering an abortion? Don't do it. It isn't worth it. You'll regret it as long as you live. Abortion is a permanent solution to a temporary problem.

Based on your own experience, what would you tell a court that believes abortion should be legal? I would tell the court that abortion is murder and should be outlawed. Roe v. Wade should be overturned.

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[000922]

AFFIDAVIT

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The State of PA

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B G M

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Tell approximately when and where your abortion occurred: May 1982 Hillcrest Abortion Clinic Harrisburg, PA

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How has your abortion affected you? My abortion has contributed to 4 psychiatric hospitalizations. I had such

guilt and shame that I couldn't share with others because it was my dirty secret. It affected my marriage two years later to my aborted child's father. It was an unspoken loss & sin between us that eventually helped ruin our marriage which broke up after 12 years. It has also affected my relationship with my son because I now know that I murdered his sibling through having an abortion. It was the biggest mistake of my life.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? Please don't do it. Abortion does not fix things, it makes even more problems and can ruin your emotional/spiritual health.

Based on your own experience, what would you tell a court that believes abortion should be legal? By making abortion legal it makes it appear that killing your unborn child is perfect alright and thus deceives people.

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[000926]

AFFIDAVIT

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The State of Texas

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Camelia M. Murphy

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Tell approximately when and where your abortion occurred: 1972 (Dr. Sidney Knight), 1978 (Dr. Knight), 1980 & 1981 All New Orleans, LA (Delta Women's Clinic)

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How has your abortion affected you? I have suffered with low self esteem, self hatred, suicidal impulses constant anxiety (esp. about sex and about making decisions), marital problems difficulty in bonding with my living children, guilt, shame, difficulty in daily functioning feelings of isolation from others, feelings of inferiority, failure to progress in labor (resulting in 2 c-sections)

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Based on your own experiences, what would you tell a woman considering an abortion? I could tell them "please" not to take the life of their unborn child, that they will regret it for the rest of their life if they do. I would also offer to support her in any way that I'm able.

Based on your own experience, what would you tell a court that believes abortion should be legal? I would tell the court that the only people who "benefit" from abortion are the abortions providers (in an economic sense) I would tell them that our whole country is suffering from the pain and destruction of abortion, including the unborn children, mothers, fathers, sisters, brothers, grandparents . . . (The list is endless.)

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[000937]

AFFIDAVIT

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The State of Kentucky

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Maranda Music

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Tell approximately when and where your abortion occurred: August 1993, Louisville KY

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How has your abortion affected others in your life? I treated others mean, I did not want to be around my loved ones.

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Based on your own experiences, what would you tell a woman considering an abortion? It's not worth it. By getting an abortion you may think you are helping yourself and solving a problem but your not you are causing more pain and heartache on yourself. You will never be able to forget.

Based on your own experience, what would you tell a court that believes abortion should be legal? Abortion is wrong. Abortion is killing a human being that deserves to live. We all should have the right to live.

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[000942]

AFFIDAVIT

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The State of Pennsylvania

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MARY L. NEIKAM

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Tell when and where your abortion occurred: Winter 1978 at Women's Suburban Clinic, Paoli, PA

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How has your abortion affected you? I suffered from depression, the lack of ability to get close to anyone. I lost perspective on my life and began drinking more. My desire to have a baby increased, I longed for that baby.

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Based on your own experiences, what would you tell a woman considering an abortion? You will be just as much a victim as that baby. The baby is alive & knows who you are you will always grieve for your child even if you don't recognize the symptoms you experience as grief.

Based on your own experience, what would you tell a court that believes abortion should be legal? Abortion is harmful to women; spirit, soul & body (mentally, emotionally & physically. It's not natural for a woman to dispose of her own child. There are long lasting effects.

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[000955]

AFFIDAVIT

The State of Wisconsin

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T.M.N.

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Tell when and where your abortion occurred: PROFFESSIONAL BUILDING IN EAU CLAIRE, WI APPROXIMATELY JANUARY 3, 1985.

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How has your abortion affected you? I REALIZED THE TRUTH BEFORE LEAVING THE ROOM. DEVELOPED MANIC-DEPRESSION, SLEEPING DISORDERS, PANIC DISORDERS OVER NEXT 11 YEARS UNTIL A SEVERE BREAKDOWN INTO CLINICAL DEPRESSION OCT OF 1996, WHICH I DEAL WITH DAILY NOW.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? CONTRARY TO WHAT PRO-CHOICERS CLAIM, THERE ARE MANY PHYSICAL AND PSYCHOLOGICAL RISKS TO ABORTION. I WOULD SHOW DIFFERENT RESOURCES, EXPLAINING WHERE I HAD MANY WOMEN I KNOW COULD BE GROUPED IN. MOST OF ALL, HAVING AN ABORTION IS THE BEGINNING OF LONG-TERM PROBLEMS.

Based on your own experience, what would you tell a court that believes abortion should be legal? BEYOND THE CONSTITUTIONAL PROBLEMS OF "ROE V WADE" AND INFORMATION USED FOR THE DECISION, I COMPARE THIS WITH MEDICINES AND PROCEDURES THAT REQUIRES STUDIES SHOWING IT'S SAFENESS. THERE ARE MANY STUDIES AND WRITINGS SHOWING

LONGTERM NEGATIVE RESULTS, PARTICULARLY PSYCHOLOGICALLY, OF ABORTION THAT ARE BEING IGNORED.

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[000956]

AFFIDAVIT

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The State of North Carolina

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A.C.N.

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Tell when and where your abortion occurred: New Orleans, Louisiana fall 1981

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How has your abortion affected you? My abortion took away my sense of self-worth and self confidence. It has made me question my ability to make competent decisions.

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Based on your own experiences, what would you tell a woman considering an abortion? Do Not Do It!

Based on your own experience, what would you tell a court that believes abortion should be legal? Please make sure a woman knows ALL the options that are available, and is aware of the consequences – physical and mental – that accompanying abortion. The procedure only takes a few minutes, the pain lasts a lifetime.

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[000971]

AFFIDAVIT

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The State of Nevada

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Christian M. Ongley

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Tell approximately when and where your abortion occurred: May 1993 Newport DE

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How has your abortion affected you? I grieved the loss/murder of my child so much that I would have preferred death. I wanted my baby back so desperately that I purposefully got myself pregnant and had twins (March 19 1995). One boy & one girl. It was psychologically more devastating than being molested and sexually abused by my biological father. The abortion will be with me for the rest of my life. I have already begun ingraining in my children that sex is for marriage and marriage alone I always fear that I won't be able to have more children.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? even if it's rape – give the baby up for adoption. If it's incest pray about it.

Based on your own experience, what would you tell a court that believes abortion should be legal? Explain to me why I was legally able to murder my child but if I had killed my father who had molested me at seven yrs of age and then sexually abused me when I was 12 to about 16 – almost

17, I would have been sentenced. My baby did nothing wrong; my dad did.

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[000992]

AFFIDAVIT

The State of Texas

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Kaye Peterson

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Tell when and where your abortion occurred: Spring, 1975, doctor's office, San Antonio, TX

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How has your abortion affected you? I believe it made me neurotically fearful of responsibility. I was just sad for 22 years.

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Based on your own experiences, what would you tell a woman considering an abortion? Though you may be in terrible anguish, please do the right thing. You already have a baby – not a potential one, as I told myself. How I wish I had talked to someone and been willing to listen.

Based on your own experience, what would you tell a court that believes abortion should be legal? You may tell yourself you're only trying to help women, but the opposite is true. It's hard to think clearly in a crisis pregnancy. We

need the law to help us, not hinder us in making good decisions.

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[001034]

AFFIDAVIT

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The State of Minnesota

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Lauralee Peterson

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Tell approximately when and where your abortion occurred: December 1981

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How has your abortion affected you? My abortion has given me 22 years of sorrow and regret. When I realized the development of my child and the fact that abortion stopped my child's beating heart I was filled with anger and sorrow. At the age of 16 I was not mature encugh to make such a decision. My other children also know they have a missing sibling.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? Abortion kills – solves nothing. I would tell her she is already a mother, her choice is to kill, to parent or to give the child for adoption. Abortion is permanent, can never be changed or replaced – the grief never stops.

Based on your own experience, what would you tell a court that believes abortion should be legal? A government's job is to protect innocent life and to ensure justice. Abortion is

a grave injustice, like slavery it relegates some people as less than human. It is completely immoral. It is murder.

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[001035]

AFFIDAVIT

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The State of NEVADA

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JACCI PIERCE

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Tell when and where your abortion occurred: APRIL 2000; LAS VEGAS NEVADA

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How has your abortion affected you? HAVING THAT ABORTION, KILLING MY BABY, HAS AFFECTED MY LIFE IN EVERY ASPECT. IT CREATED SEVERE EMOTIONAL DAMAGE THAT ALSO CAUSED RELATIONSHIP DAMAGE NOT TO MENTION ONLY PUTS ANOTHER PROBLEM ON TOP OF ANOTHER PROBLEM WHICH MAKES IT EVEN MORE DIFFICULT TO COPE.

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Based on your own experiences, what would you tell a woman considering an abortion? I WOULD TELL THAT WOMAN THAT IT WILL BE THE WORST EXPERIENCE OF THEIR LIFE. THAT THEY ARE TRYING TO PUT A BAND-AID OVER THE REAL SITUATION BUT INSTEAD THEY ARE CARVING A SCAR AND I WOULD TELL THEM ALL FACTS!

Based on your own experience, what would you tell a court that believes abortion should be legal? I WOULD TELL THEM THAT THEY

SHOULD FREE ALL THE PRISONERS LOCKED UP FOR MURDER! I WOULD TELL THEM THAT OUR COUNTRY IS GOING TO SLOWLY FADE AWAY . . . ANYONE WHO THINK COLD KILLING IS A 'WOMANS' SOMETIMES EVEN A *CHILDS* CHOICE IS OK SHOULD APPRECIATE *THEIR* BREATH MORE & THANK THE LORD THEY HAVE A CHOICE TO LIVE!

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[001044]

AFFIDAVIT

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The State of MS

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Pamela D. Pigott

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Tell approximately when and where your abortion occurred: WASHINGTON, DC FEB 1973 or 1972 AUG 1973 or 1972

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How has your abortion affected you? TO THIS DAY, I CONSIDER MYSELF A MURDERER, ONE WHO HAS TAKEN THE LIFE OF AN INNOCENT CHILD. THERE IS NOTHING I HAVE BEEN ABLE TO DO THAT WOULD *EVER* ABSOLVE ME OF THIS CRIME EXCEPT THE BLOOD OF CHRIST. DRUGS, ALCOHOL AND SEX WERE THINGS I USED TO KILL THE ANGUISH OF WHAT I DID NOT ONCE BUT *TWICE*. NONE OF THAT WORKED.

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Based on your own experiences, what would you tell a woman considering an abortion? DON'T DO IT! DO NOT DO IT! UNDER ANY CIRCUMSTANCES. DO NOT DO IT!

Based on your own experience, what would you tell a court that believes abortion should be legal? IT IS NOT IN THE BEST INTEREST OF THE WOMAN TO MURDER HER BABY AND IT IS NOT IN THE BEST INTEREST OF SOCIETY TO CONDONE THE THE ACT. TO SHED INNOCENT BLOOD FOR ANY REASON IS WRONG; TO SHED IT FOR THE SAKE OF CONVENIENCE IS AN ABOMINATION. "THE HAND THAT ROCKS THE CRADLE RULES THE WORLD." OUR CRADLES ARE FILLED WITH BLOOD AND WE ARE SURPRISED WHEN CHILDREN KILL CHILDREN.

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[001045]

AFFIDAVIT

The State of Texas

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Bethann Pritchard

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Tell when and where your abortion occurred: December 19th, 1980; abortion clinic in Pasadena, Texas, behind Sruthmore Hospital. Dr. Swade (Schrade?) was the doctor.

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How has your abortion affected you? How has it *not* affected me!?!? Every area was affected – more drugs, alcoholism, promisuousness, inability to have deep, sustained relationships. *Inability to conceive* since my abortion.

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Based on your own experiences, what would you tell a woman considering an abortion? I would tell her not to have one – it destroys your life and kills your baby. I would give *anything* to be able to go back and make a different choice – to choose life, for me and my baby.

Based on your own experience, what would you tell a court that believes abortion should be legal? No, No, No – abortion should NOT be legal. I wish it hadn't been legal when I had my abortion. There are other means to deal with an unwanted pregnancy – adoption, foster homes, carrying to term – there is only *one way – LIFE*!! Abortion *IS* murder, and murder is against the law!!!

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[001065]

AFFIDAVIT

The State of Texas

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PATRICIA PULLIAM

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Tell when and where your abortion occurred: 1974 Detroit, Michigan

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How has your abortion affected you? Early on it caused depression and marital problems. Later it led me to begin counseling at a crisis pregnancy center in Houston, TX.

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Based on your own experiences, what would you tell a woman considering an abortion? The solution of ending the life of your own child is the worse violence you can do to yourself. By removing, by force, a human life you demean yourself as a woman totally.

Based on your own experience, what would you tell a court that believes abortion should be legal? The Legal Killing of your own child is an act of desperation and confusion. If full knowlege of all the aftermath of abortion was made public it's social acceptability would become less and less. If abortuary facilities were held accountable to the same degree as other medical facilities this would all stop.

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[001067]

AFFIDAVIT

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The State of Texas

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Lynn F. Rasberry

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Tell approximately when and where your abortion occurred: 1980 Houston Texas

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How has your abortion affected you? I now realize that this was sin and have gone to the Lord to ask for forgiveness. Unfortunately 20 years has passed and I have not had another child. That one pregnancy was my only chance to bare children. This has caused me much agony

and personal pain. I have had to deal with anger and relationship problems and was divorced after the abortion. I have not remarried and feel this is also due to my abortion. I have had to deal with issues regarding my worth as a woman since I am not married and have no children If I would have known the risks and complications from abortion both physical, emotional, and spiritual, I would not have had an abortion.

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Based on your own experiences, what would you tell a woman considering an abortion? I would make sure that the woman was informed regarding all the possible risks to her health and emotional wellbeing and also to the affect oh her relationship with God and her future without this child in her life.

Based on your own experience, what would you tell a court that believes abortion should be legal? I would tell the courts that abortion is a crime against humanity. A woman was not created to kill her own children. This is contrary to her nature and legalized abortion encourages the woman to take this option that will affect her for life. The child will never leave her emotionally, but will always exist.

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[001082]

AFFIDAVIT

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The State of Tennessee

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R.W.R.

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Tell when and where your abortion occurred: February, 1989, Marina del Rey, California

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How has your abortion affected you? I feel guilty. I love children but don't really feel that I deserve one. I have been diagnosed with endometreosis (?) and may not be able to have any now anyway. Don't really think I can ever get close enough to anyone to trust them with this shame so I am still single.

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Based on your own experiences, what would you tell a woman thinking of having an abortion? Get all the facts and get all the options. 9 months of discomfort are nothing compared to the lifetime of guilt and shame you will feel. Not to mention the horror when you realize what you did to your own child. Be very sure you can live with the outcome.

Based on your own experience, what would you tell a court that believes abortion should be legal? Legal murder is still murder. We have no right to decide who lives or dies nor should we. If the truth about abortion were made public I cannot imagine any decent human being approving of this

horror. We condemned Hitler. How can we not condemn ourselves for allowing this to continue.

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[001091]

AFFIDAVIT

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The State of TEXAS

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Dorothy Rogers

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Tell when and where your abortion occurred: FEBRUARY – 1975 10½ weeks MEDICAL RESEARCH ASSOCIATES CLINIC, SAN ANTONIO TEXAS DR. BRANDON CHENAULT

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How has your abortion affected you? YES . . . EMOTIONAL PAIN AND TORMENT FOR YEARS UNTIL GOD FORGAVE AND HEALED ME. IT HAS AFFECTED ME PHYSICALLY AS WELL. I CANNOT HAVE CHILDREN.

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Based on your own experiences, what would you tell a woman considering an abortion? DON'T DO IT! YOU WILL REGRET IT FOR THE REST OF YOUR LIFE. NO MATTER HOW BAD YOUR SITUATION IS, THERE ARE ALTERNATIVES. IT'S NOT WORTH THE HEALTH RISKS INVOLVED. YOU ARE KILLING A HUMAN BEING.

Based on your own experience, what would you tell a court that believes abortion should be legal? IT IS JUST AS IF I

KILLED MY CHILD. THE ONLY DIFFERENCE WAS THAT HE WAS INSIDE OF ME AND THAT MADE IT LEGAL. IF HE WERE OUTSIDE MY BODY, IT WOULD HAVE BEEN MURDER.

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[001120]

AFFIDAVIT

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The State of California

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Gayle Schroeder

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Tell approximately when and where your abortion occurred: Feb 25, 1994 – Upland, CA Planned Parenthood

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How has your abortion affected you? I have never recovered & never will. I know God has forgiven me, but I can't forgive myself. I feel dirty & unworthy. Not a day goes by that I see a child & wonder what ours would have been like. If plann d parenthood would have told me there was other help or alternatives but never said anything. I still remember the sound of the vacuum at the abortion. But through it all I want to turn something so terrible into something positive. I want to help others not to make the same mistake & overturn Roe vs Wade

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Based on your own experiences, what would you tell a woman considering an abortion? Don't listen to abortionists see a sonogram, get facts on when a babys heart first beats.

You can never go back. Abortion is not something you correct & make right again. It's final I have so much I could draw on over these past years to help someone.

Based on your own experience, what would you tell a court that believes abortion should be legal? every human being has rights that includes unborn babies – having an abortion does not free you – it makes you a prisoner to the horrific act you commited. There is no need for abortion – thousands would love to adopt & birth control is plentiful. Abortion is a money maker for abortionists who have no respect for human life.

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[001146]

AFFIDAVIT

The State of Texas

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Suella Shaner

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Tell when and where your abortion occurred: 1. 1968 private home Dallas, TX 2. 1978 clinic – Dallas Texas

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How has your abortion affected you? I live with the knowledge that my 2 aborted children might have been bone marrow matches for my 27 year old son who died of cancer 3½ yrs. ago.

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Based on your own experiences, what would you tell a woman considering an abortion? There will be long term

emotional, mental, and spiritual side-effects that will need to be dealt with.

Based on your own experience, what would you tell a court that believes abortion should be legal? I had no real choice in the matter. There are many outside pressures to abort and no education on the matter of consequences. It is not our choice many times . . . it is lambs to slaughter.

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[001161]

AFFIDAVIT

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The State of OHIO

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Amy Shatrick

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Tell approximately when and where your abortion occurred: Dec. 1990 in Akron Ohio

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How has your abortion affected you? Guilt, Guilt. Guilt. I always think of it on the anniversary. My baby would be 13 this August. I think of that every year. Unbelievable sadness. I drank heavily suffered nightmares, bad relationships, shame cervical cancer, irregular pap smears. I can't believe I killed my first baby! No one wants to discuss it. It's my secret. I never heard about what abortion actually did to the fetus or mother. It's a lie, that it is a good thing. It is a death sentence for baby & very possibly the mother physically mentally spiritually.

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Based on your own experiences, what would you tell a woman considering an abortion? I would tell her how the baby looks, what it does at 8 wks & show her pictures. Offer alternatives tell her that her & her baby are valued and loved. I would plead with her not to do it. I would share all I had experienced.

Based on your own experience, what would you tell a court that believes abortion should be legal? THAT ABORTION IS MURDER – Premeditated. It takes the babies life and ruins the mothers. It is infantacide & genocide. God will hold them accountable for there role in this.

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[001162]

AFFIDAVIT

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The State of SC

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Lawrie J. Sikkema

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Tell when and where your abortion occurred: 1979 – Navy Hospital in Okinawa Japan;

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How has your abortion affected you? Physically – tubal pregnancy, hard to concieve 3 miscarriages from scar tissue; Emotionally – severe depression, guilt, suicidal thoughts, drug & alcohol abuse, eating disorder, low self-esteem, violent anger, etc!!!

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Based on your own experiences, what would you tell a woman considering an abortion? To *PLEASE* know *EVERYTHING* about abortion before doing it (especially after-effects; other options – Adoption – pregnancy homes, Gov't. help – local help

Based on your own experience, what would you tell a court that believes abortion should be legal? Unborn, children (at *ANY* stage of life) should have the *RIGHT* to be born – these babies do not have a voice, therefore *WE* need to be their voices and speak-up for them.

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[001174]

AFFIDAVIT

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The State of TN

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Myra Simons

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Tell approximately when and where your abortion occurred: 1986 – Planned Parenthood, Memphis, TN

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How has your abortion affected you? The memory haunts my life – it is ever Present. I think about how old my child would be, what I would have named her – and all the great times we would have had. I miss my baby. It has been so long ago, but I still weep about it. I can't count the times I have walked through that Planned Parenthood Clinic in my mind.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? Please. Please stop – just because some misguided judges, say it is legal does not mean it's good for you – it is the worse decision you will ever make

Based on your own experience, what would you tell a court that believes abortion should be legal? So many lives have been lost, so many women are suffering. It is apparent our society and our legal system cares nothing for the child, but if you truly care about the woman – then stop this madness – it is so destructive to women.

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[001175]

AFFIDAVIT

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The State of Indiana

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Katy Smith

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Tell approximately when and where your abortion occurred: February 1997, Indianapolis IN

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How has your abortion affected you? In countless ways, I suffered from depression, anxiety, nightmares, fear of never being able to be pregnant again, I distrusted people. I was very angry, I stayed in a co-dependent relationship that was emotionally debilitating. I eventually sought counseling and found relief but to this day I deeply regret

my abortion, I deeply miss my child, the way that I view my life is pre & post abortion and I am not able to remember events in my life as well since the abortion

* * *

Based on your own experiences, what would you tell a woman considering an abortion? This is not an answer to the problem. That this abortion will only cause further problems in her life, she will battle depression, grief, anger, loss. She could also downward spiral into a life of drinking, STD's, more unwanted pregnancy and abortions

Based on your own experience, what would you tell a court that believes abortion should be legal? This act is an offense to our women. It is morally wrong, a barbaric, tortorous act that murders children and causes women to suffer needlessly for years. Feminists of today should realize this isn't a choice, they should fight for the mental, emotional, and physical health of women and the children they are carrying. Life is precious and should be preserved. If abortion was illegal, I never would have had one. There is no good reason, ever, to have an abortion.

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[001186]

AFFIDAVIT

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The State of Wisconsin

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Tracy A. Stalsberg

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Tell approximately when and where your abortion occurred: May 16, 1987 in Chicago, IL

* * *

How has your abortion affected you? The greatest way it affects me is in the overwhelming regret I feel and must live with for the rest of my life. In addition, I have suffered other emotional difficulties that I definitely contribute to my abortion experience. One area has been trying to deal with intense anger issues that come from feeling that I was incredibly deceived by the abortion industry. My life was changed forever, in a most horrible way, that day 15 years ago when I killed my own child and I can never take it back.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? I would tell her that abortion is not the end of your problems, but rather the beginning! I would share my own experiences and ask her if she could live with the regret of killing her own child – A CHILD, NOT A BLOB OF TISSUE – for the rest of her life?

Based on your own experience, what would you tell a court that believes abortion should be legal? I would tell them that I know that there are TWO victims of abortion – one dies physically and the other dies emotionally. Abortion DOES NOT help women, rather it hurts women!

* * *

[001198]

AFFIDAVIT

* * *

The State of Kansas

* * *

Michelle Stewart

* * *

Tell when and where your abortion occurred: in the spring of 1981 in Wichita, KS

* * *

How has your abortion affected you? It has left me devastated. I will never feel whole again, until I get to heaven, where I will see my baby for the first time.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? I would beg her not to do it – not to kill her baby! I would tell her of the unimaginable guilt, sorrow and horror she will live with every day of her life if she does. It will be the one thing in her life that she will always regret doing.

Based on your own experience, what would you tell a court that believes abortion should be legal? They are wrong. ABORTION IS MURDER and should NEVER be legal, under any circumstances. Even if I were raped, and pregnant I would not abort – No child is a mistake in God's plan. Abortion is a lie, a lie to the mother, a lie to

society, it is time for the truth. The truth is that ABORTIONS ARE WRONG!!

* * *

[001214]

AFFIDAVIT

* * *

The State of OREGON

* * *

Sherri Suminski

* * *

Tell when and where your abortion occurred: Jan. 1985 Lovejoy Clinic, Portland OR

* * *

How has your abortion affected you? The grief and guilt have been tremendous. Physically I had no complications. Mentally and spiritually I was crushed, moved into denial. When I bore my first child it became very clear what I had done – killed a living, viable baby.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? You think this is a good solution to your problem, but the consequences will be with you all your life, creating worse problems. Do not kill the life inside you, your baby, because you see it as a problem. See that LIFE inside you in the light of truth.

Based on your own experience, what would you tell a court that believes abortion should be legal? No one, mother or

father, has the right to end an innocent life. Why is it legal for a mother to kill her child because it's inconvenient, unwanted a problem? Why is her body more important, her choice more important than a living child? Why are you allowing a woman to choose to hurt herself, her child?

* * *

[001229]

AFFIDAVIT

* * *

The State of Iowa

* * *

T.T.

* * *

Tell when and where your abortion occurred: September 9, 1981

* * *

How has your abortion affected you? I developed an infection immediately and I believe it then led to painful menstrual cramps. I was also depressed for several years

* * *

Based on your own experiences, what would you tell a woman considering an abortion? I would tell her the facts of the procedure and what it does physically then I would explain the emotional effects. And then I would say "It's just plain murder" Don't do it.

Based on your own experience, what would you tell a court that believes abortion should be legal? Life should be held as precious and sacred and should be protected by the

courts. Murder is never right. The law of this nation should protect the "life" of the unborn! I implore you to make and uphold laws that make abortion illegal.

* * *

[001250]

AFFIDAVIT

* * *

The State of Texas

* * *

Marelean Thomas

* * *

Tell approximately when and where your abortion occurred: 1972 Minneapolis, Mn.

* * *

How has your abortion affected you? I was taught or told the fetus was not life. I learned better and sence I have suffered from guilt and severe depression. It has been very difficult to forgive myself. I still take antidepressants. I am haunted by the fact I have murdered the innocent. I am unable to relate to men they way I once did.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? To abort a pregnancy is murder. You will not have peace or stability in your life. It will be difficult to have a loving relation with your husband and family.

Based on your own experience, what would you tell a court that believes abortion should be legal? Abortions should not be legal because it is murder. Also take into consideration, the effect it has on the person and how the person affect society. Please overturn ROE VS WADE.

* * *

[001254]

AFFIDAVIT

* * *

The State of Arizona

* * *

Peggy Sue Trakes

* * *

Tell approximately when and where your abortion occurred: Good Samaritan Hosp; Oct. 1970

* * *

How has your abortion affected you? I had very low self-esteem after my abortion and began drinking & using drugs. I eventually married 3 times and had depression on an annual basis around the time of my abortion. My eventual ability to bond with and mother my daughter was drastically reduced b/c I had never healed from the abortion of my first child.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? No amount of rationalizing now will be worth the irreversible consequences of knowing forever that you took your baby's life. You will regret it for

the rest of your life. No reason is good enough for the pain mentally.

Based on your own experience, what would you tell a court that believes abortion should be legal? You have the power over life & death. Sometimes wrong is wrong no matter the cost. Please look @ the results of the legalization of abortion & what it has become – including late-term abortions. Why do we prosecute a criminal who kills a fetus in the process of a crime – but we don't consider it illegal if the mother consents??

* * *

[001269]

AFFIDAVIT

* * *

The State of Ohio

* * *

Beth Ann Valantine

* * *

Tell when and where your abortion occurred: Dr. Hx. Kramer – 107 Javit Court. Youngstown, Ohio 44515 12/19/83 – Youngstown Assoc. in Obstetrics & Gynecology

* * *

How has your abortion affected you? I was suicidal; full of guilt and shame. Suffered from fear & depression. Caused marital & relational problems, crying spells, anxiety, panic attacks, sleep disturbances. Suffered most on anniversary of abortion. Physically had difficulty carrying my children

(2) to term. Had (1) miscarriage. Couldn't believe God could love me.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? It is never the answer! It is not the "easy way out". It would've destroyed me if I didn't get help.

Based on your own experience, what would you tell a court that believes abortion should be legal? My choice almost destroyed my life. Who knows where my life would've gone if I had not made such a tragic decision. I was eight weeks pregnant (approx.) no one told me my baby's heart was beating and there was brain activity. All he needed was time to grow.

* * *

[001287]

AFFIDAVIT

* * *

The State of California

* * *

L.V.

* * *

Tell approximately when and where your abortion occurred: Los Angeles July 22, 1981

* * *

How has your abortion affected you? about 7 years later it hit me like a ton of bricks that I had killed my child & I

considered taking my own life because of it. If it hadn't been for a friend who led me to forgiveness of God & forgiveness from my child & to forgive myself I would not be at peace today. I now encourage expecting moms & dads to not make the same mistake. & to love & receive the gift of life irregardless of the circumstances.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? I would tell her that abortion is never the answer to a problem. To ask for help if she needs it, and if she really doesn't want the baby to give the baby to a family via adoption.

Based on your own experience, what would you tell a court that believes abortion should be legal? That an unborn human being should have the same protection as people already born. There was a time when black people were not considered human & the United States gave protection under the constitution to blacks and ALL living beings, and an unborn child is living. Also the Jews were treated as non-humans in the holocaust & the unborn children are being treated the same way.

* * *

[001294]

AFFIDAVIT

* * *

The State of WI

* * *

Barbara Vlasak

* * *

Tell when and where your abortion occurred: Madison, WI October 1975

* * *

How has your abortion affected you? When I finaly woke up to the reality of what I had done I was very upset & angry with myself. I truly feel like a murderer.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? I would tell her the whole truth. When my daughter got P.J. while still in high school I was able to share with her & she decided to have her baby & give him up for adoption. It was an open adoption & he has a great life!

Based on your own experience, what would you tell a court that believes abortion should be legal? I would tell them how very wrong they are & thousands of women who have gone through abortions would tell them the same thing.

* * *

[001307]

AFFIDAVIT

* * *

The State of Ohio

* * *

Beth Ann Ward

* * *

Tell when and where your abortion occurred: January 27, 1976 – Dayton, Ohio – Abortion Clinic

* * *

How has your abortion affected you? Initially – I became angry and depressed. My Boyfriend Broke up with me. I felt totally alone. Slowly other kids at school found out about my Abortion. I was Ashamed and Embarrassed. I secured counseling for thoughts of suicide and Depression. The Doctor used Hypnosis on me??!! And stated I needed to get in touch with my Female personhood! It took years to overcome the trauma of my abortion.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? I would plead with her not to have an Abortion. The Emotional, Physical and Spiritual consequences are Devastating!!

Based on your own experience, what would you tell a court that believes abortion should be legal? An Abortion Choice Does Not Empower A Woman. Rather An Abortion decision leaves a woman in her own personal prison. Her

prison is filled with pain and sadness and the cries from her unborn child!

* * *

[001322]

AFFIDAVIT

* * *

The State of Texas

* * *

Karen L. Waring

* * *

Tell approximately when and where your abortion occurred: 1981 in San Antonio, Texas

* * *

How has your abortion affected you? Severe depression right after and it has been 20 yrs. since and I am still working through my grief, shame and pain. I don't ever NOT think of the life that was lost. It is undoubtly the worst memory of my entire life.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? Don't do it. Get the facts, consider other options, know that it will profoundly effect you the rest of your life.

Based on your own experience, what would you tell a court that believes abortion should be legal? Abortion is murder. If you aren't willing to stab your own family members to

death how can you allow someone to perpetuate this on someone else. Every life matters, protect them.

* * *

[001324]

AFFIDAVIT

* * *

The State of Florida

* * *

JULIE R. WESLEY

* * *

Tell when and where your abortion occurred: On or about March 1980, College Park, Maryland

* * *

How has your abortion affected you? Right after my abortion a deep feeling of hate and anger towards all who were involved including myself came over me. Then a feeling of separation from my body. One month later I had a nervous breakdown and I had a drug and alcohol abuse which I almost died from and to this day a deep feeling of loss and regret.

* * *

Based on your own experiences, what would you tell a woman thinking of having an abortion? I would tell any woman considering abortion to please not do it. I would tell her my emotional torment. I would also tell her I know women who have never been able to have children because of the damage done because of abortion

Based on your own experience, what would you tell a court that believes abortion should be legal? I would say abortionists know they are taking the life of a baby. In the middle of my abortion the doctor yelled at the nurses these exact words: "How far along is she? This baby is fighting me." I had an abortion because of peer pressure but the consequences for me, the pain and loss I feel, will never go away.

* * *

[001350]

AFFIDAVIT

* * *

The State of Wisconsin

* * *

Terri White

* * *

Tell when and where your abortion occurred: August 1980 in Rockford IL

* * *

How has your abortion affected you? Physically, emotionally, spiritually – I died inside. I am unable to have more children, I have severly abused drugs & alcohol & been sexually active with many men, I have had to stuff my grief & emotions because I could not handle the fact that I killed my daughter.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? That a living, breathing

little life, her son or daughter, grows within her – she is already a mother. That sorrow, regret & grief will haunt her for years. That CPC's exist to help her to look at all the options & educate her on abortion procedures & consequences. That adoption is a beautiful choice too. I would give her the knowledge she needs to make an informed decision – not a reaction to a situation.

Based on your own experience, what would you tell a court that believes abortion should be legal? That even science agrees that a human life is present at conception & therefore we have no more "right" to kill that human being than to a kill a human being outside the womb. That our constitution affords each person the right to life, liberty & happiness. That abortion kills 2 people (at least) always – a baby dies & a mother's spirit dies too. A country that kills its own children cannot survive. There is not enough space here to say all that I would like to say!

* * *

[001355]

AFFIDAVIT

* * *

The State of Kentucky

* * *

Catherine C. Wilson

* * *

Tell approximately when and where your abortion occurred: Age 23 April '81 in Binghamton, NY

* * *

How has your abortion affected you? I have suffered with chronic depression for most of the years following my abortion. I have been suicidal at times. I have hated myself & have had great difficulty in my marriage due to the repressed grief & remorse over taking the life of my baby. I've struggled with horrible nightmares & have had a hard time accepting God's forgiveness. I experienced infertily & have lost a baby to miscarriage. I have been a prisoner in emotional jail.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? I would tell her that she will spend the rest of her life . . . grieving over the baby she would never hold. I would urge her to not make the choice to put herself through the torture that follows this dreadful choice.

Based on your own experience, what would you tell a court that believes abortion should be legal? There is nothing that kills a woman's soul more than the willful choice to destroy one's own baby. Abortion is murder of not just one life, but two. Women who have had abortions suffer in silent emotional & spiritual torture for the rest of their lives.

* * *

[001375]

AFFIDAVIT

* * *

The State of TN

* * *

Konnie S. Woods

* * *

Tell when and where your abortion occurred: Columbus Ohio at Northwest Womens Center in 1982 & 1984

* * *

How has your abortion affected you? I have no children today. I have been happily married for 10 years but I can't have a baby. I have dealt with much regret & sorrow.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? No way. It is a choice you just cannot live with. I show them how much the baby is developing and I let them know the side effects.

Based on your own experience, what would you tell a court that believes abortion should be legal? That there is no way something so horribly impacting on ones life should be legal. There is no way that anyone can understand how bad it is until they have experienced the trama.

* * *

[001389]

AFFIDAVIT

* * *

The State of Michigan

* * *

Mary Ellen York

* * *

Tell approximately when and where your abortion occurred: 1972 New York

* * *

How has your abortion affected you? I was affected dramaticly by my abortion for years I couldn't even look at a baby & when I heard the word abortion I would just cringe. I suffered depression & I didn't like myself very much. Feelings of guilt, I found it very hard to forgive myself. It took my life from me.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? That you will regret it. You might think it's the only answer now. But, it will haunt you for the rest of your life.

Based on your own experience, what would you tell a court that believes abortion should be legal? I don't see how you as a court believe in abortion. A court is about justice & fairness, it is not just or fair to the innocent baby (human being) being aborted. Abortion is murder no matter which way you look at it!

* * *

[001401]

AFFIDAVIT

* * *

The State of Tennessee

* * *

Suzanne Young

* * *

Tell approximately when and where your abortion occurred: January, 1979 – Little Rock, AR

* * *

How has your abortion affected you? Until Jesus came for me on January 17, 1991, I struggled with an inability to maintain close relationships; anger and bitterness towards my mother, my friends, and the world in general. An absolute aborhance for pro-life advocates. I drank a lot of alcohol, smoked a lot of marijuana and had a lot of casual relationships with men. At one point I considered suicide.

* * *

Based on your own experiences, what would you tell a woman considering an abortion? That the consequences are enormous and the emotional pain is unspeakable.

Based on your own experience, what would you tell a court that believes abortion should be legal? Abortion hurts women! The courts are always willing to hand down decisions to protect the general populace except in regards to abortion. This is a procedure that hurts women, kills

babies, destroys relationships. This is an issue of "the greater good." Abortion is not for the "greater good."

* * *

[001403]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Norma McCorvey, formerly known as JANE ROE,	§	
Plaintiff,	§	
V.	§	CIVIL ACTION NOS. 3-3690-B AND 3-3691-C
HENRY WADE, Through His Official Successor in Office, William "Bill" Hill, Dallas County District Attorney,	§	3:03 CV 1340-N
Defendant.	§	

RULE 60 MOTION FOR RELIEF FROM JUDGMENT

(Filed Jun. 17, 2003)

TO THE HONORABLE COURT:

NOW COMES, NORMA MCCORVEY, formerly known in this Court as Jane Roe, the Plaintiff herein (hereinafter referred to as "Plaintiff"), and would respectfully show this Honorable Court the following:

1. Pursuant to Federal Rules of Civil Procedure, Rule 60(b)(5) and (6), Plaintiff files this Rule 60 Motion For Relief From Judgment. Plaintiff hereby seeks the relief of vacating this Court's previous judgment in favor of Plaintiff in this cause on the grounds it is no longer just or equitable to give it prospective application.

FACTUAL HISTORY AND PROCEDURAL BACKGROUND

2. On June 17, 1970, a three-judge court issued a ruling in this cause declaring the Texas abortion laws that prohibited abortions except to save the life of the mother unconstitutional.[1] On January 22, 1973, the United States Supreme Court affirmed this Court's judgment.[2] On the same day, the United States Supreme Court also ruled in a companion case to *Roe, Doe v. Bolton.*[3]

3. The existing and prospective application of this Court's judgment and the subsequent affirmation of the Supreme Court prevent the state of Texas from enforcing its laws prohibiting abortion except to save the life of the mother.

REQUEST FOR THREE-JUDGE COURT

4. Plaintiff requests that this Motion be heard and determined by a three-judge court in accordance with 28 U.S.C.S. §§ 2281 and 2284. This cause of action was originally heard by a three-judge court in 1970 in accordance with 28 U.S.C.S. § 2281 which provided for a three-judge court for cases involving injunctions against enforcement of State statutes. Although 28 U.S.C.S. § 2281 was repealed by amendments to 28 U.S.C.S. § 2284, the repeal "shall not apply to any action commenced on or before the date of enactment [enacted Aug. 12, 1976]". 28 U.S.C.S. § 2284. This cause commenced before the date of

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[1] *Roe v. Wade,* 314 F.Supp. 1217 (1970) (hereinafter "*District Court Roe*").

[2] *Roe v. Wade,* 410 U.S. 113 (1973) (hereinafter "Roe").

[3] 410 U.S. 179 (1973) (hereinafter "*Doe*").

enactment and involves an original cause of action seeking an injunction against the enforcement of a State statute. Furthermore, 28 U.S.C.S. § 2284 provides that when a three-judge court is required under federal statute "[a] single judge shall not . . . hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits." This Motion pursuant to Fed. R. Civ. P. 60(b) is seeking a final determination on the merits and accordingly the three-judge court should be re-convened to hear this Motion.

PARTIES

5. Plaintiff, Norma McCorvey, formerly known in this Court as Jane Roe, is the original Plaintiff herein, and an original party hereto.

6. Defendant, Henry Wade, is represented in this cause by and through his official successor in office, William "Bill" Hill, Dallas County District Attorney. The State of Texas entered as a party after receiving notice of intent to seek a declaration of the unconstitutionality of a state statute.

7. James Hubert Hallford was granted leave to intervene by the District Court. John and Mary Doe filed a companion complaint, cause no. 3-3691-C, and the two actions were consolidated and heard together.[4] Dr. Hallford and the Does were held not to have standing by the United States Supreme Court.[5]

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[4] 410 U.S. *at* 121-22.

[5] 410 U.S. *at* 125-28.

REQUEST FOR EVIDENTIARY HEARING AND ORAL ARGUMENT

8. There has been a significant change in both the factual and legal landscape surrounding this cause of action since the three-judge court's original ruling in this case. Plaintiff Norma McCorvey is alleging both (1) significant changes in factual conditions and (2) significant changes in law which make if no longer just to continue the prospective application of *Roe*. With respect to the factual allegations, there must be a factual determination made, an opportunity for the presentation of evidence, and the development of a full record. A thorough hearing and development of an adequate fact-finding record is necessary in order for the Court and, in the event of an appeal, the appellate court, to make fully informed, intelligent and well-reasoned decisions. Appellate Courts do not conduct their own fact-finding hearings, they rely upon the lower courts to develop a proper record.

9. When considering a motion pursuant to Fed. R. Civ. P. 60(b), the "threshold issue" is whether the factual landscape has changed since the court's previous decision.[6] Factual matters should be decided by the trial court. The decisions of the Supreme Court in *Roe v. Wade* and *Doe v. Bolton* are obviously of tremendous national concern and importance. They remain as controversial today as they were when decided thirty years ago. The importance of these cases and the issues raised in Plaintiff's Motion for Relief From Judgment warrant a full and complete factual exposition of changed factual circumstances. Accordingly,

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[6] *Agostini v. Felton*, 521 U.S. 203 (1997) (hereinafter "*Agostini*").

pursuant to the Federal Rules of Civil Procedure, Plaintiff hereby requests an evidentiary hearing and oral argument before the three-judge court in order to present the evidence and legal authorities now available to the Court.

CASE LAW AND AUTHORITIES

10. Federal Rule of Civil Procedure 60(b)(5) and (6) provide:

> "(b) On motion and upon such terms as are *just*, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is *no longer equitable* that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment." [Emphasis added.]

11. The primary United States Supreme Court opinion which determines the proper legal standard for a court to follow when considering a motion pursuant to Fed. R. Civ. P. 60(b) is *Agostini v. Felton.*[7] In *Agostini,* twelve years after the Supreme Court held in *Aguilar v. Felton*[8] that the Establishment Clause barred the New York City Board of Education from sending public school teachers into parochial schools, the Board and parochial school children's parents filed a motion under Fed. R. Civ. P. 60(b)(5) seeking relief from the permanent injunction

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[7] *Id.*

[8] 473 U.S. 402 (1985).

entered by the Court in 1985. The Court found that a motion pursuant to Fed. R. Civ. P. 60(b) was procedurally sound and the appropriate vehicle for the parties to seek relief from a prior ruling of the Court.[9] The Court also found that the doctrines of *stare decisis* and the law of the case " . . . do(es) not preclude us from recognizing the change in our law and overruling *Aguilar* and those portions of *Ball* inconsistent with our more recent decisions."[10] "The doctrine does not apply if the court is 'convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.'"[11]

12. In *Agostini,* the Court not only found that it had jurisdiction and authority to overrule their prior ruling in the same cause of action when considering a Fed. R. Civ. P. 60(b) motion, they also found that they had the authority to overrule a companion case to the current cause of action at bar.[12] Similarly, Plaintiff hereby requests that the Court not only overrule the prior decision in *Roe,* but also overrule the decision in the companion case hereto, *Doe.* Further, the evidence as presented herein and as Plaintiff will present at the evidentiary hearing and oral argument as requested herein will show that the prior decision of the Court is clearly erroneous and would work a manifest injustice if applied prospectively. Accordingly, under both Fed. R. Civ. P. 60(b) and *Agostini,* Plaintiff hereby requests that the prior ruling of the Court in this cause be vacated.

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[9] 521 U.S. at 214.

[10] *Agostini,* 521 U.S. 203; *School District of Grand Rapids v. Ball,* 473 U.S. 373 (1985) (the companion case to *Agostini).*

[11] 521 U.S. at 236.

[12] *See Agostini,* 521 U.S. 203.

13. When considering a Fed. R. Civ. P. 60(b) motion, the Court determined in *Agostini* that the threshold issue to be decided is "whether the factual or legal landscape has changed since . . . [the prior ruling of the Court]."[13] In *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 384 (1992), the Supreme Court held that it is appropriate to grant a Fed. R. Civ. P. 60(b) motion when the parties seeking relief can show, "a significant change either in factual conditions or in law. 'A Court may recognize subsequent changes in either statutory or decisional law.'" "The Court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong."[14] Either a change in law or factual circumstances is sufficient by itself.[15] Both need not be proven. There have been significant changes in both factual circumstances and law since the prior ruling of the Court in *Roe.* New factual and legal evidence since the Court's decision in *Roe* and its companion case, *Doe,* as presented herein, in the Brief in Support of this Motion (incorporated herein by reference), and as will be presented to the Court at the evidentiary hearing requested by Plaintiff, now establishes that *Roe* and *Doe* have become an "instrument of wrong".[16] Accordingly, under Fed. R. Civ. P. 60(b) and current United States Supreme Court case law as cited herein, it is no longer just or equitable to give the *Roe* and *Doe* decisions prospective application.

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[13] 521 U.S. at 216.

[14] *Railway Employees v. Wright,* 364 U.S. 642, 647 (1961).

[15] 521 U.S. at 214.

[16] *See Railway Employees v. Wright,* 364 U.S. 642 (1961).

CHANGES IN LAW

14. There have been significant changes in both decisional law and statutory law since the Court's original ruling in this case. The three-judge court in the original cause of action in *District Court Roe* herein declared the Texas abortion statutes void as vague and overbroad, infringing upon Plaintiffs' Ninth and Fourteenth Amendment rights. The District Court found that if the right to procure an abortion is based upon the right to privacy under the Ninth and Fourteenth Amendments to the United States Constitution, then abortion is a fundamental liberty interest that the state could only infringe upon if there was an existing compelling state interest. *Id.* In *Roe,* the Supreme Court found that the state has a legitimate interest in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term.[17]

15. Since the original ruling of this Court and the United States Supreme Court in *Roe,* the Supreme Court has issued opinions in a number of subsequent cases that have significantly undermined the legitimacy of its ruling in *Roe. Webster v. Reproductive Services*[18], began the subsequent erosion of *Roe,* while not overruling it directly. The *Webster* ruling first allowed a state to favor childbirth over abortion and provided for viability testing, stating, "[t]here is no doubt our holding today will allow some

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[17] 410 U.S. at 162-63.

[18] *Webster v. Reproductive Services,* 492 U.S. 490 (1989) (hereinafter referred to as *"Webster"*).

governmental regulation of abortion that would have been prohibited . . . " under prior decisions.[19]

16. The *Casey*[20] decision further undermined *Roe*. The *Casey* opinion elevated society's profound interest in "potential" life[21]. Furthermore, the plurality opinion in *Casey* rejected *Roe's* classification of abortion as a fundamental right requiring strict scrutiny, stating, "[w]e acknowledge that our decisions after *Roe* cast doubt upon the meaning and reach of its holding."[22]

17. The over-expansive definition of "fundamental liberty interest" set forth in *Roe*, and even *Casey*, has been rejected by subsequent decisions of the Supreme Court. Specifically, in *Washington v. Glucksberg*[23] the Court's decision changed the underlying test used to determine which rights asserted by litigants should be ranked as "fundamental liberty interests" that are Constitutionally protected. In *Glucksberg*, a physician filed suit in federal court, claiming Washington's law banning assisted suicide violated his and his patient's Fourteenth Amendment liberty interest in determining the time and manner of one's death.[24] The *Glucksberg* Court established a new, two-prong test to enumerate which rights are so "implicit in the concept of ordered liberty"[25] as to be considered

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[19] 492 U.S. at 520-21.

[20] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (hereinafter referred to as "*Casey*").

[21] *Id.*

[22] *Casey at 845.*

[23] *Washington v. Glucksberg*, 521 U.S. 702 (1997) (hereinafter referred to as "*Glucksberg*").

[24] *Id*

[25] *See Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

"fundamental" and therefore Constitutionally protected. To be considered a fundamental liberty interest, the Supreme Court held that the right in question must:

(1) find a cognizable basis in the Constitution's language or design[26]; and

(2) be "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[27]

18. The *Glucksberg* Court found that there is no fundamental liberty interest to determine the time and manner of one's death because: (1) "[the] right to assisted suicide finds no cognizable basis in the Constitution's language or design"[28]; and the "right to die" is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[29] Applying the *Glucksberg* test directly to the case at bar, the right to procure an abortion (1) finds no cognizable basis in the Constitution's language or design, and (2) is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* To the contrary, the *Roe* Court itself indicated that "[t]he Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century."[30] If anything, the regulation of abortion, rather than the right to procure an abortion, is "rooted in the traditions and conscience of our people"[31] as evidenced by a

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[26] 521 U.S. at 723, n. 18 (*quoting Vacco*, 80 F.3d 716 (1997)).

[27] 521 U.S. at 721 (*quoting Snyder*, 291 U.S. 97, 105 (1934)).

[28] 521 U.S. at 723, n. 18 (*quoting Vacco*, 80 F.3d 716 (1997)).

[29] 521 U.S. at 721 (*quoting Snyder*, 291 U.S. 97, 105 (1934)).

[30] 410 U.S. at 116.

[31] 521 U.S. at 721 (*quoting Snyder*, 291 U.S. 97, 105 (1934)).

century of statutes prohibiting the same. In light of such dramatic changes in decisional law, if this original cause of action were decided today, under the *Glucksberg* standard, the Texas abortion statutes should be upheld as Constitutionally sound. Based upon these subsequent changes in decisional law, there is no fundamental liberty interest to procure an abortion and it would be error for the Court to refuse to grant this Motion pursuant to Fed. R. Civ. P. 60(b) in light of such changes.[32] "It would be anomalous if the results reached under a constitutional standard remained binding after the standard or test was repudiated."[33]

19. Extremely significant changes in the law of federalism have occurred in Supreme Court decisions in recent years which would justify returning the decision whether to allow or prohibit abortion to the states.[34] Before *Roe* federalized the issue, women and family health and safety issues, and specifically abortion, were traditional state and local concerns.[35] With the re-emergence of federalism in recent landmark decisions, the Supreme Court has moved this critical area of constitutional jurisprudence to the forefront of federal judicial review. Beginning with *United States v. Lopez*, this movement represents a renewed emphasis on the judicial enforcement of the constitutional federalism boundary lines.[36]

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[32] *See Agostini.*

[33] *Planned Parenthood v. Casey*, 947 F.2d 682 (1991).

[34] *See, e.g.*, U.S. *v. Lopez*, 514 U.S. 549 (1995) *U.S. v. Morrison*, 529 U.S. 598 (2000), *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1995). (Need more cases here.)

[35] 410 U.S. at 139, 140 n. 34-37; 492 U.S. at 520 ("areas of medical practice traditionally subject to state regulation").

[36] 514 U.S. 549 (1995); *U.S. v. Morrison*, 529 U.S. 598 (2000), *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1995).

While the Court has largely focused on Congress in *Lopez* and its progeny, the *doctrine of federalism* applies to the dangers of overreaching national power among all branches of government, including the Supreme Court itself. In fact, "the danger to federalism may be greater from the federal courts than from Congress simply because judicial intervention is anti-democratic" such that "the states have relatively little recourse."[37] The common thread among the line of federalism cases involves the court's restriction of expansion of national power into traditional state law matters such as education, crime, family law and health issues, which abortion clearly involves.

20. Yet *Roe* is now completely contrary to this new line of cases. The Court's application of *Lopez* federalism to *Roe* could not only properly return this traditional state law matter to the states, but it could also restore the democratic processes needed on this issue of great controversy.[38] Therefore, in reversing *Roe,* the Court would be correcting excessive judicial intervention in these cultural clashes which can stoke great public resentment, politicize the courts themselves, and impede the abiding progress that comes from democratic governance.[39] The *Roe* decision has politicized every presidential election and Supreme Court nomination

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[37] J. Harvie Wilkinson III, *The 2000 Justice Lester W. Roth Lecture: Federalism for the Future,* 74 S. CAL. L. REV. 523, 536 (2001).

[38] *See* Plaintiff's Brief in Support of Rule 60 Motion for Relief From Judgment.

[39] *See* Justice Scalia bemoaning "carts full of mail" and "demonstrators" outside the Supreme Court, *Webster,* 492 U.S. at 535, (concurring in part and concurring in judgment).

since its decision and will do so until it is overruled and this issue is returned to the states and the people for democratic regulation.

21. In addition to the considerable changes in decisional law outlined above, there have also been significant changes in statutory law since the Court's original ruling in *Roe*. The overwhelming majority of states now permit some form of recovery for the loss of a child in the womb. For example, approximately ten states and the District of Columbia recognize a common law cause of action for mental anguish suffered as a result of the loss of a child in the womb.[40]

Illinois, North Carolina, Pennsylvania, Vermont and the District of Columbia recognize a common law cause of action for mental anguish suffered as a result of the death of an unborn child and a wrongful death cause of action for the death of a viable fetus. However, several states that recognize a common law cause of action for mental anguish suffered as a result of the death of an unborn child

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[40] *Krishnan v. Sepulveda;* 916 S.W. 2d 478 at 480-81, n.2 (1995), citing *Modaber v. Kelley,* 232 Va. 60, 348 S.E.2d 233, 237 (Va. 1986); *Giardina v. Bennett,* 111 N.J. 412, 545 A.2d 139, 140-42 (N.J. 1988); *Johnson v. Ruark Obstetrics and Gynecology Associates, P.A.,* 327 N.C. 283, 395 S.E.2d 85, 98-99 (N.C. 1990); *Hilsman v. Winn Dixie Stores, Inc.,* 639 So. 2d 115, 117 (Fla. App. 1994); *McGeehan v. Parke-Davis,* 573 So. 2d 376, 376-78 (Fla. App. 1991); *Prado v. Catholic Medical Center of Brooklyn and Queens, Inc.,* 145 A.D.2d 614, 536 N.Y.S.2d 474, 475 (N.Y. App. Div. 1988); *District of Columbia v. McNeill,* 613 A.2d 940, 942-44 (D.C. 1992); *Seef v. Sutkus,* 205 Ill. App. 3d 312, 562 N.E.2d 606, 608-09, 150 Ill. Dec. 76 (Ill. App. 1990); *Milton v. Cary Medical Center,* 538 A.2d 252, 256 (Me. 1988); *Amadio v. Levin,* 509 Pa. 199, 501 A.2d 1085, 1088-89 (Pa. 1985); *Vaillancourt v. Medical Center Hosp. of Vermont,* 139 Vt. 138, 425 A.2d 92, 95 (Vt. 1980); *Johnson v. Superior Court of Los Angeles Cty.,* 123 Cal. App. 3d 1002, 177 Cal. Rptr. 63, 65 (Cal. App. 1981).

do not recognize a wrongful death cause of action for the death of a viable fetus.[41] It is important to note that most

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[41] *See Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354, 358 (Ala. 1974); *Summerfield v. Superior Court of Maricopa Cty.*, 144 Ariz. 467, 698 P.2d 712, 724 (Ariz. 1985); *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406, 407-08 (Conn. Super. Ct. 1966); *Worgan v. Greggo & Ferrara, Inc.*, 50 Del. 258, 128 A.2d 557, 558 (Del. Super. Ct. 1956); *Greater Southeast Community Hosp. v. Williams*, 482 A.2d 394, 397-98 (D.C. 1984); *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100, 103 (Ga. App. 1955); *Wade v. U.S.*, 745 F. Supp. 1573, 1579 (D. Hawaii 1990); *Volk v. Baldazo*, 103 Idaho 570, 651 P.2d 11, 15 (Idaho 1982); *Chrisafogeorgis v. Brandenberg*, 55 Ill. 2d 368, 304 N.E.2d 88, 91-92 (Ill. 1973); *Britt v. Sears*, 150 Ind. App. 487, 277 N.E.2d 20, 26-27 (Ind. App. 1971); *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 833-34 (Iowa 1983); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1, 3 (*Kan.* 1962); *Mitchell v. Couch*, 285 S.W.2d 901, 906 (Ky. 1955); *Danos v. St. Pierre*, 402 So. 2d 633, 639 (La. 1981); *State ex rel. Odham v. Sherman*, 234 Md. 179, 198 A.2d 71, 73 (Md. 1964); *Mone v. Greyhound Lines, Inc.*, 368 Mass. 354, 331 N.E.2d 916, 920 (Mass. 1975); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785, 786 (Mich. 1971); *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838, 841 (Minn. 1949); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434, 439-40 (Miss. 1954); *O'Grady v. Brown*, 654 S.W.2d 904, 911 (Mo. 1983); *White v. Yup*, 85 Nev. 527, 458 P.2d 617, 623-24 (Nev. 1969); *Poliquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249, 251 (N.H. 1957); *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, 495 (N.C. 1987); *Salazar v. St. Vincent Hosp.*, 95 N.M. 150, 619 P.2d 826, 830 (N.M. App. 1980); *Hopkins v. McBane*, 359 N.W.2d 862, 865 (N.D. 1984); *Werling v. Sandy*, 17 Ohio St. 3d 45, 476 N.E.2d 1053, 1056 (Ohio 1985); *Evans v. Olson*, 550 P.2d 924, 927-28 (Okla. 1976); *Libbee v. Permanente Clinic*, 268 Ore. 258, 518 P.2d 636, 640 (Or. 1974); *Amadio v. Levin*, 509 Pa. 199, 501 A.2d 1085, 1089 (Pa. 1985); *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748, 754 (R.I. 1976); Cert. of Question of Law from U.S. Dist. Ct., 387 N.W.2d 42, 45 (S.D. 1986); S.D. Codified Laws § 21-5-1 (1987); *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42, 45 (S.C. 1964); Tenn. Code § 20-5-106 (1994); *VaillanCourt v. Medical Center Hosp. of Vermont*, 139 Vt. 138, 425 A.2d 92, 95 (Vt. 1980); *Moen v. Hanson*, 85 Wash. 2d 597, 537 P.2d 266, 268 (Wash. 1975); *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428, 436 (W. Va. 1971); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107, 112 (Wis. 1967). But *see Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 132-33, 139 Cal. Rptr. 97 (Cal. 1977); *Kuhnke v. Fisher*, 210 Mont. 114,

(Continued on following page)

of these states characterize a viable fetus as a "person" or "minor child" under their wrongful death statutes.

22. Another significant statutory change since the original decision of the Court in this cause of action is the new Texas law providing that a woman can simply abandon an "unwanted" child at a hospital, clinic or emergency room within sixty (60) days of birth with no questions asked and no threat of criminal prosecution.[42] Because of this new law, there is no longer a need to seek an abortion to avoid any "unwanted" burdens of motherhood. The effect is that the state of Texas will help the mother and is willing to assume all of the responsibilities, financial and otherwise, of raising the child. Since the Texas statute providing for dropping off an "unwanted" child was pioneered, at least forty (40) other states have enacted similar legislation.[43] In addition, Texas, along with all

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683 P.2d 916, 919 (Mont. 1984); *Egbert v. Wenzl*, 199 Neb. 573, 260 N.W.2d 480, 482 (Neb. 1977).

[42] Tex. Fam. Code Ann. §§ 262.301-262.303, and § 262.105; Texas Penal Code §22.041(h).

[43] *See* Ala. Code § 26-25-1 *et seq.* (2000); Ariz. Rev. Stat. § 13-3623.01 (2001); Ark. Code Ann. § 9-34-202 (Michie 2001); Cal. Health & Safety Code § 1255.7 (Deering 2000); Colo. Rev. Stat. § 19-3-304.5 (2000); Conn. Gen. Stat. § 17a-57 *et seq.* (2000); Del. Code Ann. tit. 16 § 907A (2001); Fla. Stat. Ann. § 383.50 *et seq.* (West 2000); Ga. Code Ann. § 19-10A-1 *et seq.* (2002); Idaho Code § 39-8201 *et seq.* (2001); § 325 Ill. Comp. Stat. 2/1 *et seq.* (West 2001); Ind. Code § 31-34-2.5-1 *et seq.* (Michie 2000); Iowa Code §233.1 *et seq.* (2001); Kan. Stat. Ann. § 38-15,000 (2000); Ky. Rev. Stat. Ann. § 405.075 (2002); La. Ch. Code art. 1701 *et seq.* (West 2000); Me. Rev. Stat. Ann. tit. 17-A § 553 (2002); Md. Code Ann. Cts. & Jud. Proc. § 5-641 (2002); Mich. Comp. Laws § 750.135 (2000); Minn. Stat. § 145.902 (2000); Miss. Code Ann. § 43-15-201 *et seq.* (2001); Mo. Rev. Stat § 210.950 (2002); Mont. Code Ann. § 40-6-401 *et seq.* (2001); N.Y. Penal § 260.03; Penal § 260.15; and, Soc. Serv. § 372-g (2000); N.C. Gen. Stat. § 7B-500 (2001); N.D. Cent. Code § 50-25.1-15 (2001); Ohio Rev. Code Ann. § 2151.3515 *et seq.* (Anderson

(Continued on following page)

other states, will pay for medical expenses associated with pregnancy for the needy. The Supreme Court in *Roe* was concerned with imposing upon the mother:

> "a distressful life and future . . . psychological harm . . . mental and physical health may be taxed by child care . . . the distress for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it."[44]

At the time *Roe* was decided, the laws providing for all medical expenses associated with pregnancy for the poor and allowing any mother to let the state bear all burden associated with raising a child did not exist, and the Court could not have known that any such law would ever be enacted. The burdens the Court was concerned about being imposed upon a mother are no longer legally hers should she choose not to bear them. In light of such a dramatic change in law, the *Roe* decision is no longer based on sound legal or factual circumstances.

2001); Okla. Stat. tit. 10 § 7115.1 (2001); Or. Rev. Stat. § 418.017 (2001); Pa. Stat. Ann. tit. 23 § 6501 *et seq.* (2002); R.I. Gen. Laws § 23-13.1-1 *et seq.* (2001); S.C. Code Ann. § 20-7-85 (2000); S.D. Codified Laws § 25-5A-27 *et seq.* (Michie 2001); Tenn. Code Ann. § 68-11-255 (2001); Tex. Fam. Code Ann. § 262.301 *et seq.* (West 1999); Utah Code Ann. § 62A-4a-801 *et seq.* (2001); Wash. Rev. Code § 13.34.260 (2002); W. Va. Code § 49-6E-1 *et seq.* (2000); Wis. Stat. Ann. § 49.192 (West 2001); Wyo. Stat. Ann. § 14-11-101 *et seq.* (Michie 2003). *See generally* Baby Moses Project at www.babymosesproject.org.

[44] 410 U.S. at 153.

FACTUAL CHANGES

23. In addition to the significant changes in decisional and statutory law since the original ruling of the Court in this cause, there have also been dramatic changes in factual circumstances and available scientific knowledge. Just as *Brown v. Board of Education*,[45] overturned *Plessy v. Ferguson*,[46] because subsequent facts showed that "separate but equal" had become inherently unjust, the new facts revealed in this Motion (in the Brief in Support of this Motion, and which will be revealed in full detail at the evidentiary hearing requested herein) demonstrate that *Roe* is no longer just, but inherently unjust, and provide the decisional basis for the Court to vacate their previous ruling in this cause.

24. At the time of the *Roe* decision, the Court stated that scientific, philosophical, and religious reasoning had not been able to determine when human life begins. The Court stated:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[47]

In previous decisions, the Court has treated the question of when human life begins as a matter of opinion, belief, or a point of view because it has never been presented with

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[45] 247 U.S. 483 (1954).

[46] 163 U.S. 537 (1896).

[47] 410 U.S. at 181.

clear and compelling scientific evidence which allows the matter to be resolved objectively rather than through opinion. New scientific and medical evidence and advances in technology since 1973, as described herein and as will be more thoroughly presented at the evidentiary hearing requested in this cause, clearly demonstrate that human life begins at conception and therefore the previous ruling in this cause should be vacated as it would be unjust to have prospective application.[48]

25. An explosion of medical and scientific knowledge regarding the humanity of the unborn child has occurred since the Court's original ruling in *Roe*. Advances in ultrasound technology now make it possible to see even the eyebrows and eyelashes of unborn children. It is now possible to successfully perform in-utero surgery on an unborn child at very early stages of pregnancy. The viability date of unborn children has continued to advance year after year. Improvements in neo-natal medical technology now make it possible for dramatically premature infants to live when just a few years ago they would not have survived. When considering a mother and her unborn child, the fact that the Court is dealing with two persons can be very clearly and solidly proven. DNA technology, previously unavailable to the Court, can remove any doubt in this regard. If a DNA sample from the mother's arm and one from her child in the womb are sent anonymously to a DNA testing lab for identification, the lab will report that two separate humans are reflected in the samples. If samples from the mother's arm and leg, parts of her "own

[48] *See* Scientific and Medical Analysis attached hereto in Appendix, Tab H, pp. 5197-5347; *See also Agostini*.

body" were sent, testing would show only one person is involved, the same person.

26. In addition, the Court in *Roe* made a non-evidence based assumption that an idealized or even normal doctor-patient relationship would exist between a woman seeking an abortion and the physician to perform the abortion.[49] That assumption is belied by the actual practices of the abortion industry since 1973. The real life experiences of the women that have had abortions and the individuals that have worked in abortion clinics since 1973 now shows that the abortion industry does not adequately protect women.[50] The Affidavits attached hereto, the Brief in Support of this Motion, and the testimony to be presented at the evidentiary hearing requested herein reveals new factual evidence that the abortion industry does not provide women with the protections of a true doctor-patient relationship, fails to provide women with the information necessary to truly make an informed decision regarding the procedure, fails to maintain the normal standards of health, safety, and professionalism required of medical personnel, regularly misleads or deceives

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[49] 410 U.S. at 166.

[50] *See* Affidavit of Plaintiff Norma McCorvey, attached hereto in the Appendix, Tab A, pp. 1-14; *see also* the Affidavits of more than one thousand Post-Abortive Women (hereinafter the "Women's Affidavits"), attached hereto in the Appendix, Tab B, pp. 15-1410; *see also* the Affidavit of Theresa Burke, Ph.D., attached hereto in the Appendix, Tab D, pp. 1422-1667; *see also* the Affidavit of David Reardon, Ph.D., attached hereto in the Appendix, Tab E, pp. 1668-1804, Exhibits to Affidavit of David Reardon, Ph.D., Appendix Tab E, pp. 1805-4307; *see also* the Client Intake Records for Pregnancy Care Centers, attached hereto in the Appendix, Tab F, pp. 4308-5188; *see also* the Affidavit of Carol Everett, former abortion provider, attached hereto in the Appendix, Tab G, pp. 5189-5196.

women regarding the nature and development of their unborn children, and generally fails to adequately protect the mental and physical safety of women.[51]

27. New factual evidence regarding the physical and mental consequences of abortion on women, the result of more than thirty years of legalized abortion, is also available to the Court. Plaintiff Norma McCorvey never experienced an abortion herself. Norma McCorvey's baby in *Roe* was born and placed for adoption before the Supreme Court decision in *Roe* took effect.[52] Having never experienced an abortion, Plaintiff McCorvey was merely making assumptions as to the effect of abortion on herself, just as the Court did. Neither the Plaintiff herein nor the Supreme Court in 1973 could truly know beforehand what the effects of widespread legalization would be for women. Abortion was mostly rare and illegal in 1973.[53] As the attached Affidavit of Plaintiff and the Women's Affidavits reveal, assuming what an abortion is like and actually experiencing an abortion are two very different things, both physically and mentally.[54]

28. In addition to the testimony of Plaintiff Norma McCorvey (both in the attached Affidavit and her live testimony to be given at the evidentiary hearing requested herein), the attached Women's Affidavits from more than one thousand Post Abortive Women are the largest body of

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[51] *Id.*

[52] *See* Affidavit of Plaintiff Norma McCorvey, attached hereto in the Appendix, Tab A. pp. 1-14.

[53] 410 U.S. at 118, n. 2.

[54] *See* Affidavit of Plaintiff Norma McCorvey, attached hereto in the Appendix, Tab A, pp. 1-14; *see also* the Women's Affidavits, attached hereto in the Appendix, Tab B, pp. 15-1410.

direct, sworn, factual evidence about the effects of abortion on women that has ever been presented to the United States Courts. This large body of new factual evidence was not available to this Court, the Supreme Court or Norma McCorvey in 1973.[55]

29. The Women's Affidavits, the Brief in Support of this Motion, and the new factual evidence and testimony previously unavailable to the Court that will be presented at the evidentiary hearing requested herein reveal:

a) that abortion is inherently unlike any other medical procedure and the long-term physical and mental effects are devastating to women;

b) the mental and emotional consequences of abortion include increased likelihood of attempting suicide, increased rate of chemical abuse and addiction, depressive disorders, anxiety disorders, promiscuity, self-destructive behavior including self-mutilation and repeated abortions, food related disorders including anorexia and bulimia, phobias and many other severe emotional and mental disorders and suffering;

c) that abortion dramatically increases the likelihood of developing breast cancer, pelvic inflammatory disease, infertility, complications in later pregnancies, miscarriage, uterine-perforations, tubal or ectopic pregnancies, placenta previa, and a number of other physical complications;

d) that abortion is often not a voluntary decision but is the result of pressure and coercion from one or more individuals or outside circumstances;

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[55] *Id.*

e) that the normal protections of a physician-patient relationship are absent in the context of abortion;

f) that abortion is usually performed with a lack of informed consent from the patient.[56]

In light of these new facts, and others, that were not known or anticipated by the Court at the time of its original ruling, the prospective application of the decisions in *Roe* and *Doe* would be inherently unjust. It is just that the Court's judgment be vacated.

30. New facts, previously unavailable to the Court have been revealed regarding the decision made in *Doe v. Bolton* as well. Sandra Cano was the "Mary Doe" of *Doe v. Bolton*, the companion case to *Roe*. The attached Affidavit of Sandra Cano reveals new facts regarding her case that were previously unavailable to the Court.[57] Her Affidavit shows that serious fraud was committed upon the Supreme Court in her case. The affidavit of Sandra Cano reveals facts which if known at the time would probably have prevented the Supreme Court from erroneously creating the "health" exception to *Roe's* trimester framework. Her affidavit

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[56] *See* Affidavit of Plaintiff Norma McCorvey, attached hereto in the Appendix, Tab A, pp.1-14; *see also* the Affidavits of more than one thousand Post-Abortive Women (hereinafter the "Women's Affidavits"), attached hereto in the Appendix, Tab B, pp. 15-1410; *see also* the Affidavit of Theresa Burke, Ph.D., attached hereto in the Appendix, Tab D, pp. 1422-1667; *see also* the Affidavit of David Reardon, Ph.D., attached hereto in the Appendix, Tab E, pp. 1668-1804, Exhibits to Affidavit of David Reardon, Ph.D., Appendix Tab E, pp. 1805-4307; *see also* the Client Intake Records for Pregnancy Care Centers, attached hereto in the Appendix, Tab F, pp. 4308-5188; *see also* the Affidavit of Carol Everett, former abortion provider, attached hereto in the Appendix, Tab G, pp. 5189-5196.

[57] *See* Affidavit of Sandra Cano, attached hereto in the Appendix, Tab C, pp. 1411-1421.

demonstrates her own desire that the decision in her case be overturned.[58]

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff Norma McCorvey respectfully prays for the following relief:

a. the immediate re-convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284;

b. an evidentiary hearing and oral argument before the three judge court;

c. an order by the three judge court that the judgment heretofore entered in favor of Plaintiff is vacated in light of changed law and factual conditions because it is no longer just or equitable to give it prospective application; and

d. such other and further relief as this Honorable Court may deem just and proper.

APPENDIX:

Tab A – Affidavit of Plaintiff Norma McCorvey, pp. 1-14
Tab B – Affidavits of More Than One Thousand Post-Abortive Women (Referred to Herein as "Women's Affidavits"), pp. 15-1410
Tab C – Affidavit of Sandra Cano, the "Doe" *of Doe v. Bolton*, pp. 1411-1421
Tab D – Affidavit of Theresa Burke, Ph. D., pp. 1422-1667
Tab E – Affidavit of David Reardon, Ph.D., pp. 1668-1804,

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[58] *Id.*

Exhibits to Affidavit of David Reardon, Ph.D., pp. 1805-4307

Tab F – Client Intake Records from Pregnancy Care Centers, pp. 4308-5188

Tab G – Affidavit of Carol Everett, Former Abortion Provider, pp. 5189-5196

Tab H – Scientific And Medical Analysis, pp. 5197-5347

Respectfully Submitted,

THE JUSTICE FOUNDATION
(Formerly Texas Justice Foundation, and still doing business in Texas as Texas Justice Foundation)
Attorneys for Plaintiff Norma McCorvey, formerly known in this cause as Jane Roe

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CERTIFICATE OF SERVICE

A true copy of the above and forgoing has been hand-delivered to: the Texas Attorney General, 300 W. 15th Street, Austin, Travis County, and the District Attorney for Dallas County, Frank Crowley Courts Building, 133 N. Industrial Blvd. LB19, Dallas, Dallas County, Texas.

SIGNED on this the 17th day of June, 2003:

/s/ Allan E. Parker, Jr.
Allan E. Parker, Jr.

CERTIFICATE OF CONFERENCE

I hereby certify that on June 12 and 13, 2003, I had a telephone conference with Ted Cruz, Solicitor General for the State of Texas regarding this Motion. An agreement could not be reached, and therefore a hearing on this matter will be required.

I hereby certify that I contacted the office of Bill Hill, District Attorney for Dallas County, Texas, on June 13 and June 16, 2003. ~~We were/were not able to reach an agreement regarding this Motion.~~ Bill Hill neither agreed to nor opposed this Motion.

SIGNED on this the 17th day of June, 2003.

/s/ Allan E. Parker, Jr.
Allan E. Parker, Jr.

[LOGO] **The Justice Foundation**

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December 20, 2004

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1 First Street N.E.
Washington, D.C. 20543

RE: Rule 32 Filing, Petition for Writ of Certiorari from the Fifth Circuit No. 03-10711; *McCorvey v. Hill* (USDC 3:03-CV-1340-N formerly 3-3690-B and 3-691-C formerly known as *Roe v. Wade*)

Dear Mr. Suter:

Pursuant to Rule 32, Norma McCorvey, the former "Roe" of *Roe v. Wade,* Petitioner in the above-styled proceeding now known as *McCorvey v. Hill,* hereby places in the custody of the Clerk, true and correct copies of affidavits which are exhibits of material forming part of the evidence in the case below. *See* Reasons for Lodging attached. The evidence was referred to by Judge Jones in her concurring opinion below. This request is unopposed by Respondent.

Specifically, it includes over 1,000 post-abortive Women's Affidavits, the Affidavits of medical experts Dr. Theresa Burke and Dr. David Reardon, and the Pregnancy Care Center Counseling Intake Records. *See* Summary of Evidence attached. The evidence demonstrates the importance of this case, the harm to women, and the need for certiorari due to changed factual and legal conditions since 1973.

Norma McCorvey will be filing her Petition for Writ of Certiorari with this Court on or before January 18, 2005. On June 17, 2003, as an original party to the original judgment in *Roe v. Wade,* Norma McCorvey filed a post-judgment Rule 60 Motion for Relief from Judgment asking that the *Roe v. Wade* opinion be reversed and the original judgment in her favor be vacated. Bill Hill is the successor to Henry Wade, District Attorney of Dallas County, who was the "Wade" of *Roe v. Wade.* Her motion for relief is based on *Agostini v. Felton,* 521 U.S. 203 (1997) on the grounds that factual and legal conditions have changed substantially since 1973 so that it is no longer just to give the case prospective application.

In the alternative, if the material is not appropriate under Rule 32.1, this letter also constitutes a request for lodging under Rule 32.3. The attached "Reasons for Lodging and Summary of the Rule 60 Motion Evidence" explains the need for lodging the evidence for assistance to the Court in evaluating the Petition for Certiorari. This request is filed more than two weeks prior to submission of the Petition pursuant to the rule.

Sincerely,

/s/ Allan E. Parker, Jr.
Allan E. Parker, Jr.
Lead Attorney for Norma McCorvey, the former Roe of *Roe v. Wade*

Cc: Bill Hill
Frank Crowley Courts Building
133 N. Industrial Blvd., LB 19
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REASONS FOR LODGING AND SUMMARY OF EVIDENCE

I. REASONS FOR LODGING

Petitioner believes it is very important to the nation, and to the Court, that the Court view all of the evidence in support of McCorvey's Rule 60 Motion, even at the Petition for Certiorari stage. Petitioner would not presume to ask the United States Supreme Court to overturn one of its decisions without preparing substantial evidence for the Court's review.

Norma McCorvey filed 5,347 pages of sworn evidence with her Rule 60 Motion. In determining whether to grant a Writ of Certiorari and hear the case, the Court should be able to look at this evidence to help it determine whether or not the case warrants the Court's full review. The evidence is extensive, so this letter must be lengthy to adequately summarize the evidence.

A Petition for Certiorari is not the appropriate vehicle to bring this exhaustive and compelling evidence to the Court. Attaching 5,347 pages of evidence as an Appendix is too bulky and voluminous to append to 40 copies of a Petition as this would require printing 200,000 pages. Filing one complete set of evidence with the Court can be accomplished with two boxes. Hard copies of the sworn evidence would then be available to those members of the Court who would wish to review the evidence before making a decision on certiorari.

Judge Edith Jones of the Court of Appeals for the Fifth Circuit, reviewed this substantial evidence in her concurring opinion and stated that she "fervently hoped that the Court would someday acknowledge such developments and re-evalute *Roe* and *Casey,* accordingly."

McCorvey v. Hill, 385 F.3d 846, 853 (5th Cir. 2004). Judge Jones' analysis and opinion are persuasive and worthy of great consideration on such an important matter, and supports the granting of certiorari. Petitioner supplies this information to give the Court such an opportunity.

Justice requires that when the original "Roe" of *Roe v. Wade* presents substantial evidence of changed legal and factual conditions, it should be heard under Rule 60. Petitioner presented over 1,000 affidavits of post-abortive women, citations to over 300 scientific studies and medical literature, reports of psychotherapists, geneticists, neonatologists, and numerous other experts, as well as persons with experience working in abortion clinics. Judge Edith Jones' analysis and supporting footnotes follow:

> McCorvey presented evidence that goes to the heart of the balance *Roe* struck between the choice of a mother and the life of her unborn child. First, there are about a thousand affidavits of women who have had abortions and claim to have suffered long-term emotional damage and impaired relationships from their decision.[6] Studies by scientists, offered by McCorvey, suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions.[7]

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[6] R. at 15-1410, Affidavits of More Than One Thousand Post-Abortive Women.

[7] *See* R. at 1669-1718, Affidavit of David Reardon, Ph.D. (reporting on clinical and scientific findings demonstrating that abortion is linked to emotional, physical, and psychological problems in women and criticizing the studies relied on by the *Roe* Court). *See also* C. A. Barnard, *The Long-Term Psychosocial Effects of Abortion* (Portsmouth, NH: Institute for Pregnancy Loss, 1990); W. Franz & D. Reardon,

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Second, *Roe*'s assumption that the decision to abort a baby will be made in close consultation with a woman's private physician is called into question by affidavits from workers at abortion clinics, where most abortions are now performed. According to the affidavits, women are often herded through their procedures with little or no medical or emotional counseling.[8] Third,

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Differential Impact of Abortion on Adolescents and Adults, 27(105) Adolescence 161-72 (1992); M. Gissler, et al., *Suicides after pregnancy in Finland: 1987-94: register linkage study,* BMJ, 313:1431-4 (1996); B. Lask; J. Lydon, et al., *Pregnancy Decision Making as a Significant Life Event: A Commitment Approach,* 71(1) Journal of Personality and Social Psychology, 141-51 (1996); B. Manjor & C. Cozzarelli, *Psychosocial Predictors of Adjustment to Abortion,* 48(3) Journal of Social Issues, 48(3) 121-42 (1992); W. B. Miller, *An Empirical Study of the Psychological Antecedents and Consequences of Induced Abortion,* 48(3) Journal of Social Issues 67-93 (1992); W.B. Miller, *Testing a Model of the Psychological Consequences of Abortion,* The New Civil War: The Psychology, Culture, and Politics of Abortion, (American Psychological Assoc., Linda J. Beckman & S. Maria Harvey, eds. Washington, DC 1998); H. Söderberg, et al., *Emotional distress following induced abortion: A Study of incidence and determinants among abortees in Malmö Sweden,* 79 Eur. J. Obstet. Gynecol. Reprod. Biol. 173-78 (1998); H.P. Vaughan, *Canonical Variates of Post Abortion Syndrome Elective Abortion and Pre-natal Grief* (cited by Reardon).

[8] *See, e.g.,* R. at 1721-57, Affidavit of David Reardon, Ph.D. (reporting, based on numerous studies, investigations and interviews, that women visiting abortion clinics receive little to no counseling (and what counseling is received is heavily biased in favor of having an abortion), are rushed through the process, and exposed – without sufficient warning – to health risks ranging from unsanitary clinic conditions to physical and psychological damage); R. at 1668-1804, Exhibits to Affidavit of David Reardon; Ph.D. (studies, full interviews, and other analysis supporting conclusions); R. 4308-5188 Client Intake Records from Pregnancy Care Centers (cataloging the emotional, physical, and psychological symptoms felt by hundreds of women after having an abortion who then sough post-abortion counseling); R. at 5189-96 Affidavit of Carol Everett (written testimony of a former abortion clinic worker, reporting that, in her clinic, both abortion counselors and physicians worked on commission and aggressively

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McCorvey contends that the sociological landscape surrounding unwed motherhood has changed dramatically since *Roe* was decided. No longer does the unwed mother face social ostracism, and government programs offer medical care, social services, and even, through "Baby Moses" laws in over three-quarters of the states, the option of leaving a newborn directly in the care of the state until it can be adopted.[9] Finally,

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followed a script to encourage prompt election of the procedure – even when the patient was not pregnant; that physicians usually performed 10 to 12 abortions per hour; that the clinic transported women to hospitals secretly by car when complications arose (to avoid bad publicity); and that she saw one woman die and 19 others permanently maimed by abortion procedures); R. at 10, Affidavit of Norma McCorvey (describing abortion facilities based upon her work experience in clinics).

[9] *See* ALA. CODE § 26-25-1 *et seq.* (2000); ARIZ. REV. STAT. § 13-3623.01 (2001); ARK. CODE ANN. § 9-34-202 (MICHIE 2001); CAL. HEALTH & SAFETY CODE § 1255.7 (DEERING 2000); COLO. REV. STAT. § 19-3-304.5 (2000); CONN. GEN. STAT. § 17a-57 *et seq.* (2000); DEL. CODE ANN. tit. 16 § 907A (2001); FLA. STAT. ANN. § 383.50 *et seq.* (WEST 2000); GA. CODE ANN. § 19-10A-1 *et seq.* (2002); IDAHO CODE § 39-8201 *et seq.* (2001); § 325 ILL. COMP. STAT. 2/1 *et seq.* (West 2001); IND. CODE § 31-34-2.5-1 *et seq.* (MICHIE 2000); IOWA CODE § 233.1 *et seq.* (2001); KAN. STAT. ANN. § 38-15,100 (2000); KY. REV. STAT. ANN. § 405.075 (2002); LA. CH. CODE ART. 1151 (West 2000); ME. REV. STAT. ANN. tit. 17-A § 553 (2002); MD. CODE ANN. CTS. & JUD. PROC. § 5-641 (2002); MICH. COMP. LAWS § 750.135 (2000); MINN. STAT. § 145.902 (2000); MISS. CODE ANN. § 43-15-201 *et seq.* (2001); MO. REV. STAT. § 210.950 (2002); MONT. CODE ANN. § 40-6-401 *et seq.* (2001); N.Y. PENAL § 260.03; PENAL § 260.15; and, SOC. SERV. § 372-g (2000); N.C. GEN. STAT. § 7B-500 (2001); N.D. CENT. CODE § 50-25.1-15 (2001); OHIO REV. CODE ANN. § 2151.3515 *et seq.* (ANDERSON 2001); OKLA. STAT. tit. 10 § 7115.1 (2001); OR. REV. STAT. § 418.017 (2001); PA. STAT. ANN. tit. 23 § 6501 *et seq.* (2002); R.I. GEN. LAWS § 23-13.1-1 *et seq.* (2001); S.C. CODE ANN. § 20-7-85 (2000); S.D. CODIFIED LAWS § 25-5A-27 *et seq.* (MICHIE 2001); TENN. CODE ANN. § 68-11-255 (2001); TEX. FAM. CODE ANN. § 262.301 *et seq.* (WEST 1999); UTAH CODE ANN. § 62A-4a-801 *et seq.* (2001); WASH. REV. CODE § 13.34.360 (2002); W. VA. CODE § 49-6E-1 *et seq.* (2000); WIS. STAT.

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> neonatal and medical science, summarized by McCorvey, now graphically portrays, as science was unable to do 31 years ago, how a baby develops sensitivity to external stimuli and to pain much earlier than was then believed.[10] **In sum, if courts were to delve into the facts underlying *Roe's* balancing scheme with present-day knowledge, they might conclude that the woman's "choice" is far more risky and less beneficial, and the child's sentience far more advanced, than the *Roe* Court knew.** *McCorvey v. Hill,* 385 F.3d 846, 850-52 (5th Cir. 2004) (Emphasis added).

Rule 60(b) is the appropriate vehicle for the Supreme Court to review one of its own prior decisions. *Agostini v. Felton,* 521 U.S. 203 (1997). According to *Agostini,* only the Supreme Court can overturn one of its own prior decisions. This Court stated in *Agostini*:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should

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ANN. § 49.195 (WEST 2001); WYO. STAT. ANN. § 14-11-101 *et seq.* (MICHIE 2003).

[10] *See* R. 5197-5347 (submissions from numerous individuals, each holding an MD or PhD, reporting that unborn children are sensitive to pain from the time of conception, and relying on peer-reviewed, scientific journals). *See, e.g.,* Mann et al., *Prevention of Allogeneic Fetal Rejection by Tryptophan Catabolism,* 281 Science 1191 (1998); P.W. Mantyh, *Inhibition of Hyperalgesia by Ablation of Lamina I Spinal Neurons Expressing the Substance P Receptor,* 278 Science 275 (1997) (cited by Dr. David Fu Chi Mark Ph.D).

> follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas,* 490 U.S. at 484. Adherence to this teaching by the District Court and Court of Appeals in this case does not insulate a legal principle on which they relied from our review to determine its continued vitality. The trial court acted within its discretion in entertaining the motion with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent. *Agostini v. Felton,* 521 U.S. 203, 238 (1997).

Judge Jones, in her concurring opinion summarized the potential terrible injustice as follows:

> At the same time, because the Court's rulings have rendered basic abortion policy beyond the power of our legislative bodies, the arms of representative government may not meaningfully debate McCorvey's evidence. The perverse result of the Court's having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter. This is a peculiar outcome for a Court so committed to "life" that it struggles with the particular facts of dozens of death penalty cases each year.
>
> Hard and social science will of course progress even though the Supreme Court averts its eyes. It takes no expert prognosticator to know that research on women's mental and physical health following abortion will yield an eventual medical consensus, and neonatal science will push the frontiers of fetal "viability" ever closer to the date of conception. One may fervently hope that the

> Court will someday acknowledge such developments and re-evaluate *Roe* and *Casey* accordingly. That the Court's constitutional decision-making leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer . . . *McCorvey v. Hill,* 385 F.3d 846, 852-53 (5th Cir. 2004) (Jones, J., concurring).

Counsel for Norma McCorvey recognizes that normally such a voluminous record would be more appropriate for a trial court than the Supreme Court. Again, because of the unique nature of *Roe v. Wade,* and the fact that it is a Supreme Court decision which is being reviewed under Rule 60 based on changes in legal and factual conditions, counsel believes it is a special obligation of this Court to carefully consider the evidence. The trial judge did not look at the evidence, on grounds the appellate court later said were error. The Court of Appeals for the Fifth Circuit cannot reverse *Roe.* Judge Jones said she fervently hoped this Court would re-evaluate *Roe v. Wade.* This Court can make a more well-informed decision on that point if it has the opportunity to see and review the evidence. In the normal case, one can tell what the legal questions are and whether they are important without looking at the Record. But in this case, only the Supreme Court can determine if factual and legal conditions have substantially changed since 1973, and only a substantial amount of evidence could demonstrate to the Court that there is a "manifest injustice". *Agostini v. Felton,* 521 U.S. 203 (1997). Therefore, counsel sincerely believes it is important at the Petition stage, and worth the Court's time, for the Supreme Court to have the most important sworn evidence before it when it decides whether or not to grant the Petition for Writ of Certiorari.

Granting this Request for Lodging will mean that the Petition for Certiorari will be much shorter and more manageable for the Court and its staff to handle. The printer has already indicated that extra time would be required to typeset all of the evidence and put it in a regular appendix in Petition form at a cost of more than $50,000 just for the Women's Affidavits alone.

In summary, extensive sworn evidence has been provided in support of the Rule 60 Motion because this Court is the only court that is capable of re-evaluating *Roe*. Reversing *Roe v. Wade* is not a pure question of law, but requires understanding of the facts, medical research and women's actual experience of abortion. Therefore, this Court should have the evidence before it when it makes the initial determination whether to hear the case and the following is a summary of some of the items in the voluminous record.

II. SUMMARY OF EVIDENCE

A. OVER 1,000 WOMEN'S AFFIDAVITS – There are over 1,000 affidavits from women who have actually experienced abortion. These constitute R. at 000016-001410. *This is the largest body of direct, sworn testimony in the world on the effects of abortion on women.* This will help the Court to actually understand how abortion affects the women that the Court wants to protect and serve. As far as counsel can determine, it is the largest body of evidence the Court has ever had in determining the effect of abortion on women, particularly through actual sworn testimony.

As the Affidavits attest, more than 1,000 witnesses endured great pain and sacrifice to give this testimony because they wanted the Court to know the

truth about what abortion did to them. If abortion is a good thing for women, the Court should know it. If abortion is a bad thing for women, the Court should know that as well. Abortion is such a tragic and secret thing, that many of the women who testified would only do so using initials rather than using their full names. Many women agonized for months over whether to even participate in the affidavit process. They had to be willing to expose their most painful, private, personal, and secret experiences, and be willing perhaps to be cross-examined in a public courtroom. They were willing to sacrifice to tell the Court the truth about abortion. Who better than women who have experienced abortion to tell the Court the reality of abortion in American abortion clinics today?

It is extremely important for the Court to be able to view as many of these affidavits as will assist the Court. The cost of reproducing them in an appendix would be more than $50,000 through Cockle Printing Company. These affidavits personalize and humanize the reality of abortion in a way statistics can never portray. By providing these affidavits, the women are begging the Court not to indulge in what Judge Jones refers to as "willful blindness". They are eager to see other women protected from the danger and harm they have suffered. They are eager for the Court to know the truth which heretofore had been painfully hidden in the secret places of their hearts. As far as counsel can determine, no woman filled out an affidavit without crying about it because of the tremendous pain involved. Whatever one's beliefs about abortion, the Court should approach this evidence with an open mind and a compassionate heart.

The Court must be prepared to appreciate the diversity of post-abortion responses. Every woman is different. Abortion touches a person's life on many

levels. It impacts a woman's view of herself in medical, political, religious, philosophical, social and many other ways. Because it affects a woman's life in so many dimensions, it is a very complex experience. This is why it is exceptionally difficult for women to understand, process, and reconcile this experience with who they are and who they want to be. Not reviewing the complexity of this evidence reduces women to stereotypes. If one is an advocate of abortion rights, it may be painful to hear how abortion has scarred and injured some women. One may feel the impulse to reject the truth of these testimonies out of fear that such information could threaten the legal status of abortion or inappropriately discourage women from making the "right choice" to abort. However, justice requires that one set aside one's political and ideological goals, at least while reviewing the evidence. The fact that abortion has caused so much division and turmoil in our country's political life clearly suggests that it can also cause internal divisions and anxiety in a woman's life. The real experiences of women in abortion clinics, rather than judicial theory and the unverified assumptions of *Roe v. Wade,* should guide this Court in the future. In sum, we respectfully request the over 1,000 Women's Affidavits be read as part of this important decision.

B. AFFIDAVIT OF DR. TERESA BURKE, Ph.D. – Dr. Burke has specialized in treating women struggling with post-abortion issues, through individual counseling and group therapy sessions, since 1986. Her affidavit is extremely important to understanding the context of the more than 1,000 post-abortive women's affidavits and the variety of complex psychological reactions that women in general experience as a result of abortion. Her affidavit is 244 pages long. (R. at 001423-001666). Abortion reaction is not a simple subject because of the large variety of

circumstances. Women's psycho-social history is unique to each woman, and the adverse consequences of abortion take a variety of forms. It is too extensive to be reprinted in an appendix for a Petition, but it is also too important to be ignored, especially in such an area as abortion where only the Court can now protect women. It is based in large part on the findings set forth in her book, THERESA KARMINSKI BURKE AND DAVID C. REARDON, FORBIDDEN GRIEF: THE UNSPOKEN PAIN OF ABORTION, Acorn Books (2002). Drawing on the experience and insights of hundreds of her clients, Dr. Burke shows how repressed feelings about abortion may be acted out through self-destructive behavior, broken relationships, obsessions, eating disorders, parenting difficulties, and other emotional or behavioral problems. She also explores the cultural and psychological obstacles to post-abortion healing. She examines why friends and families and society erect walls of silence around a loved one's grief. She also reveals how society and this Court can and should listen to those who are struggling with past abortions.

After abortion, many women face a daily internal battle between condemning and defending themselves. Dr. Burke notes the many ways in which abortion causes conflict. It fragments political parties, churches, schools and neighborhoods. It divides families. It pits husbands against wives, mothers against daughters, sisters against sisters. It divides the academic and research community. These very conflicts in society, of which this Court is so keenly aware, also reflect the internal discord that occurs within the women themselves. Dr. Burke explains how the woman herself may be deeply conflicted between desires to keep a child and feelings of helplessness that she cannot care for a child. She may want a child and her partner or her parents may

want her to get rid of the child. She may want to abort and others she loves want her to keep the child. She may have even deeply wanted to abort the child herself, and later find herself with feelings of condemnation and self-guilt over having made that decision. The same painful torment and controversy that divides America so deeply today, divides women internally. Just as the mere discussion of abortion often produces anger and arguments in society, the abortion experience can produce anger and rage in many women. On the other hand, just as many members of society avoid discussing abortion altogether because they do not want to deal with the painful emotions it can involve, many women who have abortions repress their deepest feelings and this repression can lead to severe psychological disorders.

Just as the Court will be greatly benefited by reviewing the more than 1,000 Women's Affidavits, the Court will be greatly aided by Dr. Burke's research, expert opinions, analysis, and explanation of the varied reactions that women undergo. People who have not experienced abortion, like the Court, cannot fully understand it. They cannot generalize from their own life experiences as to how they would feel. Even for the post-abortive women, Dr. Burke demonstrates putting them in touch with their feelings is fundamental to recovery, however, this can be a difficult process because any discussion of these unwanted emotions generates tremendous resistance, denial and fear. Even pro-abortion groups such as the National Organization of Women and Planned Parenthood will freely admit that abortion is a difficult and tragic decision. *See e.g.,* Planned Parenthood Corpus Christi Board Member who stated "Abortion is an agonizing choice." "*My Choice*", TEXAS MONTHLY, at 93 (Dec. 2004). That is why they argue the decision should be solely between a woman and her doctor.

Yet very few people are willing to look at the long term consequences of this admittedly "tragic" decision. Dr. Burke's affidavit also explains why the fact that abortion hurts women is so often hidden by the women themselves. She explains how the truth is hidden from women, and by women. She explains how the fact that abortion is legal makes women presume it is safe. It is also assumed by women to be morally "right" because the Court has approved it, even though the Court knows it is not trying to make moral decisions for individual women. *See* Women's Affidavits (R. at 000016-001410). Yet many women feel tremendous guilt after experiencing abortion.

Dr. Burke explains how women who begin to explore these feelings are met with repression by other members of society. If a mother took her daughter to have an abortion because she thought it was the right thing to do, and her daughter afterwards begins to cry and complain about the abortion, the mother is filled with extreme anxiety and emotions which are difficult to process. The post-abortive women usually experience repression and denial such as, "You'll get over it." "Don't worry, it was the best thing. You had to do it." "Get on with your life." The suffering abortion victim is repressed by society and often represses herself again.

Dr. Burke explains the effects of the abortion clinic bias in favor of abortion. If a woman in a crisis pregnancy wants to place her child for adoption, by law she is protected from undue influence by the prospective adopting couple whose interests are presumed to be in conflict with the woman's. That is why we have a requirement for neutral adoption agencies, and why even a woman's written agreement to do with her body as she wishes and place her child for adoption is not binding until 10 days after birth in most cases. We recognize in the crisis pregnancy that leads

to adoption that women are emotionally vulnerable, particularly susceptible to outside influence, and that their decisions on whether or not to keep the baby may change, sometimes frequently, over the months of pregnancy and even after birth. The law protects women and as a society we help women in these vulnerable pregnancies. The law particularly tries to keep her from being influenced by the people who would profit from her decision, the adopting couple or the agencies. The law forbids financial incentives or pressure on her. However, a woman in a vulnerable or crisis pregnancy who is considering to terminate her parental rights through abortion is at the mercy of people with a profit motive for counseling her to make a quick decision to get an abortion. *See* Women's Affidavits (R. at 000016-001410).

Dr. Burke's affidavit also talks about the politicization of abortion consequences research in this country and compares abortion trauma to that of women's "hysteria" in the 1800's, shell-shock victims in World War I, and Vietnam veteran's trauma which eventually led to post-traumatic stress disorder diagnoses. Dr. Burke explains how as a society we know how to debate abortion as a political issue, but we do not know how to talk about it on an intimate and personal level. She explains there is no social norm for dealing with an abortion. There are no Hallmark cards for friends who have had an abortion, declaring either sympathy or congratulations. We do not send flowers. We do not have ceremonies. There are no social customs or rules of etiquette governing acknowledgment of an abortion. Instead, it is ignored or hidden. The September 2003 issue of Glamour Magazine shows how abortionists themselves are divided by political fear over whether to recognize post-abortion trauma. The Glamour Magazine article notes that there are many abortionists, some of

whom have combined into a group called the November Gang, who want to openly recognize the grief that women feel. They want to help their patients write letters of forgiveness to their departed children. Others want to continue to deny the existence of abortion grief, primarily for fear that it will lead to restrictions on abortions. Dr. Burke also describes how the same conflict is present in professional associations on the issue of abortion.

Dr. Burke provides extensive analysis and evidence of how women react to abortion. She states an important concept to remember in trying to understand post-abortion reactions is the concept of approach-avoidance conflicts. By definition, a trauma is an overwhelming experience that is simply "too much" for a person to handle or understand. All sides admit that the abortion decision is a "tragic" emotional decision. Even some of the strongest advocates of *Roe* want abortion to be safe, legal and "rare". Dr. Burke explains the ordinary response to a trauma is to banish the experience from one's mind – to run away from it, hide it or repress it. It is natural for trauma victims to try and forget and put their horrible experience behind them forever.

In conflict with this avoidance reaction, however, is the equally powerful human need to understand one's experiences and find meaning in them. Thus, Dr. Burke shows while a person may consciously choose to avoid thinking about the traumatic experience, his or her subconscious insists on calling attention to the trauma. The subconscious knows that an unresolved trauma is unfinished business. To be conquered, the horror of the traumatic event must be exposed, proclaimed and understood. This tension between the need to hide a trauma and the need to expose it is at the heart of many of the psychological symptoms resulting from abortion. Dr. Burke shows

many of the women want to avoid and deny the problems while at the same time seeking resolution and peace of heart. This can result in distortions between women and their children, their partners, other family members, and others in society. Dr. Burke explains some of the human defense mechanisms women experience in various ways such as suppression, repression, rationalization, reaction formation, introjection, undoing, projection, provocative behavior, displacement, conversion, withdrawal, regression, deflection, and denial.

Dr. Burke summarizes and explains, with examples, how these defense mechanisms operate to prevent or disguise the experience of painful emotions. But they always exact a price. In many cases, they can create more problems than they solve. Here are just a few of the pitfalls inherent in defense mechanisms which can be seen in human terms throughout the more than 1,000 Women's Affidavits and Dr. Burke's Affidavit.

- First, defense mechanisms consume a great deal of emotional and physical energy. Prolonged use of defensive coping mechanisms may even weaken women's immune systems, making them more vulnerable to heart disease, cancer and other stress-induced illnesses.

- Second, defense mechanisms can distort women's perception of reality. When women do not see or understand themselves and others clearly, they are doomed to fail repeatedly in dealing with their problems in a productive way.

- Third, these defenses do not filter out just painful emotions. Unfortunately, they

serve as defenses against all emotions. The women frequently feel "numb", "desensitized", etc. The more defensive mechanisms are used to protect from painful feelings, the more women are cutting themselves off from experiencing the gratifying, heartwarming, joyous, and cheerful feelings that make like meaningful.

- Fourth, these defenses themselves can give rise to major mental health problems. These can include suicidal behavior, substance abuse, eating disorders, repeated abortions, traumatic re-enactments, and the repetition of a disturbing relationship and events to name just a few of the myriad of symptoms described throughout her Affidavit.

- Finally, Dr. Burke explains defense mechanisms simply do not cleanse negative experiences. They protect from unwanted emotions, but they do not eliminate painful memories and feelings. These problems are concealed, not resolved. As more and more pain is accumulated and hidden away, women will suffer from anxiety, nervousness, agitation, and irritability. Trauma victims may become emotionally unpredictable. Whenever the defenses falter, post-abortive women experience a roller coaster of emotional explosions. It is impossible to fix a leaky pipe until you first acknowledge that it is leaking. The same is true of unwanted emotions. If injured women deny they exist, they deny themselves the chance to heal. Defense mechanisms are not a cure; they are only a series of delaying tactics.

Dr. Burke's affidavit explains why, on average, women are not able to begin to process these unwanted emotions from abortion until 8-10 years after their abortions. She explains such things as anniversary reactions (either abortion date or anticipated birth date) because these are connectors to past trauma. Some women have reactions to their monthly cycle, or the birth and death of babies, some women create baby substitutes, or find themselves totally unable to connect with babies and their other children.

Dr. Burke also explains how many women feel that God will punish them for having an abortion. Whether one believes in God or not, it is a fact that 90% of the women in America believe in a God. Therefore, unlike other medical procedures, women may feel they need to punish themselves or expect to be punished by God as a result of abortion. This type of reaction is apparent in some of the Women's Affidavits.

Dr. Burke also explains the link between sexual abuse and abortion and abortion and suicide. Abortion often results in eating disorders which are increasing throughout our culture at epidemic proportions.

In summary, Dr. Burke's affidavit is of vital importance to understanding how abortion affects the mental health of millions of women in this country, and future millions if *Roe* is not reevaluated. It is extensive, though not cumulative, or repetitious, but succinctly summarizes and outlines a vast human complexity with which the Court must be familiar if it is to make an informed, reasoned, scientific and just decision about the prospective application of the

abortion ruling. Dr. Burke's Affidavit can be found in the Record at 001423-001666.

C. **AFFIDAVIT OF DR. DAVID REARDON, Ph.D.** – The Affidavit of Dr. David Reardon, is itself approximately 136 pages long, (R. at 001669 – 001804), supported by over 2,000 pages of exhibits (R. at 001805-004307). Dr. Reardon has presented or published more than 30 academic papers at academic conferences or in journals including the American Journal of Obstetrics and Gynecology, the British Medical Journal, the American Journal of Orthopsychiatry, the Canadian Medical Association Journal, the Journal of Child Psychology and Psychiatry, and the Southern Medical Journal. He has been actively engaged in researching women's decision-making processes regarding abortion and their psychological and physical reactions to abortion since 1982. He has also authored numerous books on the subject. He is one of the world's leading experts on the effects of abortion. In this single affidavit, he has collected and presented over 300 citations to medical and scientific literature concerning the consequences of abortion. His affidavit is too extensive to be reprinted in a Petition, but is probably the single most comprehensive reference in the world to scientific and medical evidence on the adverse consequences of abortion to women in a single document. The affidavit establishes and documents the following:

(1) The death rate associated with abortion was not accurately known in 1973. The best research available today shows that death rates associated with abortion are significantly higher than death rates associated with childbirth. These higher mortality rates serve as an indication of the overall

negative effect of abortion on women's health and well-being.

(2) On average, abortion has a significant and negative impact on women's mental health.

(3) The majority of women having abortions are at risk of experiencing significant negative psychological reactions.

(4) Many, perhaps most, women who consent to an abortion find themselves in a vulnerable situation where their normal views and preferences may be distorted or manipulated by those advising them.

(5) Abortion providers do not generally offer adequate screening for risk factors nor do they provide unbiased counseling for informed decision-making. Legal obstacles make it difficult or impossible to hold abortion providers properly liable for providing adequate screening and counseling.

(6) Abortion providers have mostly ignored or abdicated their obligation to protect a woman from making an uninformed and fully consenting decision to abort even if the woman is at high risk of suffering complications or has little prospect of benefiting from the abortion being considered.

(7) In most cases, abortions are being performed not because the physician made a medical *recommendation* based on an informed evaluation of the known risks and benefits of abortion given each patient's unique psychosocial profile. Instead, the abortion is simply performed on the basis of the woman's request for it. Since the woman's request is often driven by elements

of duress and fear, proper screening would reveal that the requested procedure may be contra-indicated. Incalculable numbers of women have been exposed to, and suffered, avoidable injuries.

(8) Abortion counseling is inherently flawed by conflicts of interest, such as prejudice, greed, and a commitment to abortion as the preferred solution, or ideological commitment to population control or social engineering. These factors expose women to manipulation and deceit by persons who appear to be in a position to give them good counsel.

(9) There is no statistically validated medical evidence that abortion is ever more likely to be beneficial to any group of women in any given circumstance.

(10) Abortion places subsequent wanted children at increased risk of miscarriage, premature delivery, congenital complications, development hardships, and child abuse. These abortion associated problems place additional burdens on families and society that were not expected or understood prior to 1973.

(11) Abortion deprives women of medical and health benefits of childbirth that were not known prior to 1973.

(12) Legal abortion is not the best solution to the problem of *illegal abortions*. Instead, legalized abortion increases the total number of injuries suffered by women due to greater exposure to abortion's inherent risks.

(13) Psychological injuries related to abortion reflect, at least in part, reactions to the destruction of the maternal-child relationship.

(14) In moments of confusion, ignorance and duress, abortion often involves the destruction of wanted children.

(15) Even in cases of rape or incest, abortion is harmful to women and surprisingly and counter-intuitively most often unwanted by women once they are in that tragic circumstance.

Dr. Reardon is familiar with the worldwide literature on the subject of abortion consequences and has provided an incalculable service for the Court in preparing this affidavit. It is extremely important that the Court have this medical literature available to it before making a decision affecting the health of millions of women. By constitutionalizing abortion, the Court has taken away from legislatures any normal consumer protection role they might play after reviewing this scientific literature and acting upon it. Only the Supreme Court now has the authority to make medical and scientific decisions for our country in the area of abortion. Counsel believes it is extremely important that the Court have available for consideration the entire affidavit.

D. **PREGNANCY CARE CENTER COUNSELING INTAKE RECORDS** – The Record also includes sworn business intake forms from pregnancy care centers and post-abortion counseling groups which ask women their individual reactions to abortion. This also shows the large numbers and types of reactions to abortion. The intake forms can be found in the Record at 004309 - 005188.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Norma McCorvey, formerly known as JANE ROE,	§	
Plaintiff,	§	CIVIL ACTION
v.	§	No. 3:03-CV-1340-N
WILLIAM "BILL" HILL, Dallas County District Attorney,	§	(formerly 3-3690-B and 3-3691-C
Defendant.	§	

MOTION FOR RECONSIDERATION AND TO AMEND ORDER DENYING RULE 60 MOTION

(Filed Jul. 3, 2003)

TO THE HONORABLE COURT:

NOW COMES, NORMA MCCORVEY, formerly known in this Court as Jane Roe, the Plaintiff herein (hereinafter referred to as "Plaintiff"), and respectfully requests reconsideration of her Rule 60 Motion which was denied for lack of timeliness on June 19, 2003 and to amend this Court's Order under Rule 59(e). In addition, the Court ruled that the Rule 60 Motion does not require a three-judge court and reconsideration is also requested of that decision.

1. Pursuant to the court's inherent equity power and Federal Rules of Civil Procedure, Rule 59(e), Plaintiff files this Motion to reconsider the Court's decision in this case of June 19, 2003. Regardless of whether this Motion is referred to as a "Motion for Reconsideration" or a "Motion to Amend or Alter" the final Order of this Court, it is

properly filed under Rule 59(e).[1] Plaintiff hereby makes this Motion witnin the ten-day deadline and seeks reconsideration on errors of law and fact and manifest injustice.[2] Plaintiff objects to the decision being made prior to the convening of a three-judge court and by this Motion does not waive her objection to her jurisdictional complaint.

FACTUAL HISTORY AND PROCEDURAL BACKGROUND

2. On June 17, 1970, a three-judge court issued a ruling in this cause declaring the Texas abortion laws that prohibited abortions except to save the life of the mother unconstitutional.[3] On January 22, 1973, the United States Supreme Court affirmed this Court's judgment.[4] On the same day, the United States Supreme Court also ruled in a companion case to *Roe, Doe v. Bolton.*[5]

3. On June 17, 2003, Plaintiff filed a Rule 60 Motion for Relief from Judgment. That Motion included a request for a three-judge court, request for evidentiary hearing and oral argument, provided case law and authorities for its Motion, and details of the changes in both legal and factual conditions that have occurred in the last few years

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[1] Bass v. United States Dep't of Agriculture, 211 F.3d 959 (5th Cir. 2002).

[2] Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000) (stating grounds for order Rule 59(e) as the need to correct clear error or prevent manifest injustice).

[3] Roe v. Wade, 314 F. Supp. 1217 (1970) (hereinafter "District Court Roe").

[4] Roe v. Wade, 410 U.S. 113 (1973) (hereinafter "Roe").

[5] 410 U.S. 179 (1973) (hereinafter "Doe")

including changes occurring in 2003. In addition, the Motion and Supporting Brief included over 5,000 pages of affidavit evidence from Norma McCorvey, with over 1,000 affidavits of post-abortive women, and affidavits from scientific and medical experts.

4. Two days later, on June 19, 2003, this Court issued its Order denying the Rule 60 Motion. The Order stated that the Rule 60 Motion does not require a three-judge court and that Plaintiff did not bring her Motion within a reasonable time.[6]

5. This Motion for Reconsideration respectfully seeks reconsideration of these issues based on errors of law and facts and manifest injustice. The Court should have granted Plaintiff's Rule 60 Motion because:

(a) the Motion was filed within a reasonable time period;

(b) the Court should have ruled in the alternative that a three-judge court was required and referred it to that court;

(c) other procedural issues are not a bar to Plaintiff's Motion;

(d) Plaintiff was denied basic due process by a denial of a hearing or an opportunity to respond; and,

(e) the Court should have granted the Motion based on the evidence because there was substantial evidence of change in factual and legal conditions to find that prospective application was unjust.

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[6] Order Denying Rule 60(b) Motion at 1 (June 19, 2003).

REASONABLE TIME

6. Plaintiff respectfully contends that this Court has mischaracterized her Motion. The characterization of Plaintiff's Motion is important. It is not based on "newly discovered evidence." Such a motion must be filed within a very short period of time and may affect the justice or injustice of the original judgment. However, the Rule 60 Motion is a much more rare but still appropriate form of relief. It is based on changes in factual conditions and/or legal conditions which make a judgment, that may have once been just at the time the decision was entered, no longer just due to changed factual and legal conditions.[7] In such a case, the Motion should not be filed until the factual and/or legal conditions have changed to such a degree that "adherence to that decision would undoubtedly work a 'manifest injustice'."[8] The Court should temper finality with justice,[9] and a litigant should not be penalized for waiting for factual and legal conditions to be changed so substantially that they would meet the standard in Rule 60 that it is no longer "equitable that the judgment should have prospective application." "Because Rule 60(b) is remedial, discretion of the district court to deny a Rule 60(b) motion is limited by significant policy

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[7] See Agostini v. Felton, 521 U.S. 203, 215 (1997).

[8] *Id* at 236.

[9] Stipelcovich v. Sand Dollar Marine, 805 F.2d 599 (5th Cir. 1986). The court stated: "The rule attempts to strike a balance between two conflicting goals, the finality of judgments and the command of the court to do justice. Thus, 'although the desideratum of finality is an important goal, the justice-function of the courts demands that it must yield, in appropriate circumstances, to the equities of the particular case in order that the judgment might reflect the true merits of the cause.'" *Id.* at 604 (citations omitted).

considerations."[10] The reasoning is that the court's power in a Rule 60 Motion has been defined as a "grand reservoir of equitable power to do justice in a particular case."[11] To this end, the Rule 60 Motion should be "construed liberally to do substantial justice."[12]

7. The United States Supreme Court has rejected the mere passage of time as the standard when there have been significant changes in factual or legal conditions.[13]

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[10] In re Roxford Foods, Inc., 12 F.3d 875, 881 (9th Cir. 1993).

[11] Woods v. Kenan, 173 F.3d 770, 780 (10th Cir.), *cert denied,* 528 U.S. 878 (1999); Pierce v. Cook & Co., Inc., 518 F.2d 720 (10th Cir. 1975), *cert. denied,* 423 U.S. 1079 (1976).

[12] Fackelman v. Bell, 564 F.2d 734, 735 (5th Cir. 1977) (stating the "purpose of the motion is to permit the trial judge to reconsider such matters so that he can correct obvious errors or injustices . . . "*Id* at 736. In Fackelman, the court indicated that the district court properly denied the Rule 60 Motion because appellant could have raised the issues via appeal but had failed to do so. *Id.* at 737. This is not the case in Plaintiff Norma McCorvey's request for relief under Rule 60.

[13] Although this Court cited examples of weeks and months and not decades as prohibitive, both the United States Supreme Court and lower federal courts have allowed cases longer than that due to the surrounding circumstances of the case that would justify a Rule 60 Motion. *See, e.g.,* Agostini v. Felton, 521 U.S. 203 (1997) (12 years); United States v. Board of School Commissioners, 128 F.3d 507 (7th Cir. 1997) (30 years); Rufo Inmates of the Suffolk County Jail, 502 U.S. 367 (1992) (10 years); Railway Employees v. Wright, 364 U.S. 642 (1961) (12 years); Charter Township of Muskegon v. City of Muskegon, 303 F.3d 755 (6th Cir. 2002) (28 years); Alliance to end Repression v. City of Chicago, 237 F.3d 799 (7th Cir. 2001) (20 years); United States v. Karahalias, 205 F.2d 331 (2d Cir. 1953) (17 years); Federal Deposit Ins. Corp. v. Castle, 781 F.2d 1101 (5th Cir. 1986) (2 years); Ruiz v. Johnson, 154 F. Supp. 2d 975 (S.D. Tex. 2001) (20 years); United States v. Columbia Artists Mg., 662 F. Supp. 862 (S.D.N.Y. 1987) (32 years). In desegregation cases, the federal courts have also granted relief from decrees issues decades ago due to changes in social and factual conditions. See, e.g., Belk v. Charlotte-Mecklenburg Board of Education, 269 F.3d 305 (4th Cir. 2001) (30 years); People Who Care v. Rockford Board

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"The court cannot be required to disregard significant changes in law or fact if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong."[14] In fact, a "court errs when it refuses to modify an injunction or consent decree in light of such changes."[15] Therefore, lapse of time is not determinative,[16] but the court must make a flexible application depending on the facts of each case.[17]

8. The Motion must be brought within a "'reasonable time' . . . which depends upon the particular facts and circumstances of the case."[18] Thus, the court cannot apply a strict time limitation because the "particular facts and circumstances" of each case will be different, thereby

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of Education, 246 F.3d 1073 (7th Cir. 2001) (30 years); Manning v. School Board of Hillsborough, 244 F.3d 927 (11th Cir. 2001) (30 years); NAACP v. Duval County School, 273 F.3d 960 (11th Cir. 2001) (41 years); United States v. Texas, 158 F.3d 299 (5th Cir. 1998) (27 years); Lee v. Butler County Board of Education, 183 F. Supp. 2d 1359 (M.D. Ala. 2002) (39 years).

[14] Agostini v. Felton, 521 U.S. 203, 215 (1997) (*quoting* Railway Employees v. Wright, 364 U.S. 642, 647 (1961)).

[15] *Id.*

[16] Margoles v. Johns, 798 F.2d 1069, 1073 (7th Cir. 1986) (stating the lapse of specific period of time between entry of judgment and ruling of the motion for relief is not determinative but depends on the circumstances), *cert. denied,* 482 U.S. 905 (1987).

[17] Lairsey v. Advance Abrasives Co., 542 F.2d 928, 931 (5th Cir. 1976) (stating reasonable time by its nature invites flexible application depending upon the facts in each case).

[18] Traveler's Ins. Co. v. Liljeberg Enterprises, Inc, 38 F.3d 1404, 1410 (5th Cir. 1994); Margoles v. Johns, 798 F.2d 1069, 1073 (7th Cir. 1986), *cert. denied,* 482 U.S. 905 (1987); Lairsey v. Advance Abrasives Co., 542 F.2d 928, 932 (5th Cir. 1976); In re Pacific Far East Lines, Inc, 889 F.2d 242 (9th Cir. 1989).

requiring an analysis of when those facts and circumstances changed. Without making that assessment, this Court concluded that based merely on the passage of time that Plaintiff's Motion "was not made within a reasonable time due to the length of time alone."[19] Plaintiff respectfully submits that this was clear error. Plaintiff also submits that the appellate courts have criticized lower courts for failing to carefully consider each motion on its merits as recently indicated by the Court of Appeals for the Fifth Circuit:

> We notice that the district judge in this matter, like some other district judges in this circuit, has the custom of usually, or even always, prohibiting litigants from filing motion for reconsideration or relief, such as those contemplated by FED. R. CIV. P. 59 and 60. No judge has that authority.
>
> Accordingly, we direct the judge in this case and others in this circuit, to entertain post-judgment motions as contemplated by the rules. Moreover, the districts must *carefully consider* each such motion *on its merits,* without begrudging any party who wishes to avail himself of the opportunity to present such motions in accordance with the rules of procedure and with the standards of professional conduct.[20]

9. In her Motion, Plaintiff explained valid reasons for the length of time. Courts have denied Rule 60 motions which could have been brought earlier, but the movant

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[19] Order Denying Rule 60(b) Motion at 6 (June 19, 2003).

[20] Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 502 (5th Cir. 2000) (emphasis added).

gave no valid reasons for delay.[21] Unlike these cases, Plaintiff gave substantial evidence in its Original Motion and Supporting Brief on why it would not have been reasonable to file this Motion sooner.[22] Her entire Motion is

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[21] *See, e.g.,* Farm Credit Bank of Baltimore v. Ferrera-Goitia, 316 F.3d 62, 66 (1st Cir. 2003) (looking at six year delay between entry of default judgment and bringing Rule 60 motion without movants offering reason for delay) First Republic Bank Fort Worth v. Norglass, Inc., 958 F.2d 117, 119 (5th Cir. 1992) (plaintiff had sixty days to appeal the decision, but did not take steps to do so);

[22] Following is evidence from Plaintiff's original supporting brief and motion attesting as to why it would not have been reasonable to file this motion sooner: Changes in law:

(a) Since its original ruling in *Roe,* the Supreme Court has significantly undermined the legitimacy of that decision through its decisions in *Webster v. Reproductive Services, Planned Parenthood v. Casey,* and *Washington v. Glucksberg.* Motion, page 7-9, paragraph 15-18. Brief, pages 8-9.

(b) Recent changes in the law of federalism would now justify returning the decision whether or not to allow abortion to the individual states. Motion, pages 9-10, paragraphs 19-20. Brief, pages 8-15.

(c) The overwhelming majority of states now permit some form of legal recovery for the loss of a child in the womb. Motion, page 10, paragraph 21. Brief, pages 17-19.

(d) Under recently enacted "Baby Moses" laws, women in 40 states may be relieved from the burdens of motherhood since the state will assume the responsibility of raising the child. Motion, page 12, paragraph 22. Brief, pages 21-24.

Changes in Factual Conditions:

(a) Since 1973 there has been an explosion of relevant scientific and medical knowledge. Motion, page 14, paragraph 25. Brief, pages 25-27.

(b) New knowledge reveals that the abortion industry does not adequately protect women, nor provide women with the protections of a true doctor-patient relationship. Motion, page 14, paragraph 26. Brief, pages 27-32.

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based on the assertion of changed factual and legal circumstances which necessarily implies the passage of time. It was not until very recently that Plaintiff was able to discern a significant development in scientific knowledge and law,[23] and therefore, it was an abuse of discretion to deny the motion.[24] Furthermore, Plaintiff had to wait until the law had significantly changed to justify an attempt to overturning the 1973 judgment.[25] To manifest injustice means to become clear and obvious, not a vague or shadowy showing. After it became clear and manifest, Plaintiff required time to gather such evidence to meet the threshold condition of Rule 60(b).[26]

(c) New evidence now exists to show the physical and mental consequences of abortion on women. Motion, pages 15-16, paragraphs 27-29. Brief, pages 32-39.

(d) New facts have been revealed regarding the decision made in *Doe v. Bolton,* the companion case to *Roe,* showing that severe fraud was committed on the court in that case. Motion pages 16-17, paragraph 30. Brief, pages 41-42.

[23] The United States Supreme Court stated in *Roe* that it was unable "to arrive at any consensus . . . in the development of man's knowledge . . . " Roe v. Wade, 510 U.S. 113, 181 (1973). There has been a gradual development of scientific knowledge coupled with the gradual implementation of new law which makes this an extraordinary piece of litigation. Furthermore, neither Plaintiff nor the court can ascertain a precise moment when the factual and legal conditions changed so dramatically as to make *Roe* manifestly unjust.

[24] Clark v. Burkle, 570 F.2d 824, 832 (8th Cir. 1978) (denying hearing is abuse of discretion and noting that "this is not an ordinary run of the mill piece of litigation").

[25] *See* Agostini v. Felton, 521 U.S. 203, 212 (1997) (waiting twelve years to bring Rule 60 motion because it took that long for the evolving changes in law to become apparent).

[26] Marderosian v. Shamshak, 170 F.R.D. 335, 338 (D. Mass. 1997) (holding that Rule 60(b) is "a vehicle for 'extraordinary relief' and that

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10. Alternatively, the Court rejected Plaintiff's Motion asserting that the issue was not pled and proven.[27] However, throughout the Motion and Supporting Brief, Plaintiff details the changes in both the factual and legal conditions that have occurred. These changes have occurred as recently as 2003. For example, one factual condition that has changed since 1973 is the whole state of man's scientific knowledge regarding the humanity of the child. The humanity of the child was unknown in 1973 as even the United States Supreme Court recognized in *Roe*.[28] This factual condition has not become known until quite recently with advances in scientific knowledge;[29] but neither Plaintiff nor the court can really say with exact certainty when that point in man's knowledge was crossed. The change in factual conditions has been an evolving process with an explosion of medical and scientific knowledge as well as advances in technology in recent years. Such knowledge and advances were discussed in Plaintiff's Motion and Supporting Brief and would have been presented at an evidentiary hearing. Furthermore, this case is totally unlike the typical tort or fraud case where some bit of knowledge about the fraud or

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moving party "must give the trial court reason to believe that vacating the judgment will not be an empty exercise"). *See* attached Affidavit of Allan Parker on the difficulty of gathering evidence, Appendix to the Motion, Tab A.

[27] Order Denying Rule 60(b) Motion at 7 (June 19, 2003).

[28] The Court stated: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe v. Wade,* 410 U.S. 113, 181 (1973). Furthermore, as recently as 2002, the court has acknowledged that it is a question of fact. Acuna v. Turkish, 354 N.J. Super. 500, 808 A.2d 149 (2002).

[29] *See* Appendix to this Motion, Tab D.

some other easily established fact becomes known at some exact point in time, and then the litigant must act promptly. As the United States Supreme Court recognized in its most recent decision on the issue, the humanity of the child was at that time still a matter of some controversy with irreconcilable points of view.[30] Many may still dispute the point Plaintiff is making. Plaintiff has not waited until there was absolute consensus on the point, but only until she could prove to the court with a substantial development of medical and scientific knowledge that the decision in her case has become manifestly unjust.[31] To do otherwise would be merely a matter of Plaintiff's speculation and opinion and not medical and scientific knowledge that the court should consider. Plaintiff's personal opinions and speculation are not controlling in the Rule 60 Motion; only the changes in the factual and legal conditions that make the judgment no longer equitable in prospective application are controlling.

11. Other changes in the factual conditions include the real life experiences of the women who have had abortions. At the time of *Roe,* the Supreme Court could only make assumptions as to the effect on women or whether there would be a normal doctor-patient relationship between the woman and the abortionist. Now, the court can read the sworn statements of the physical, emotional, and psychological harm that occur to women who have abortions.[32] As

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[30] Stenberg v. Carhart, 530 U.S. 914, 920 (2000).

[31] In Carhart, the United States Supreme Court discussed the "significant medical authority supports the proposition . . . " Stenberg v. Carhart, 530 U.S. 914, 932 (2000).

[32] *See* Affidavits by the over 1,000 post abortive women at Tab B of the Original Motion.

the affidavits to the Motion and Supporting Brief attest, the women have not been able to deal with the issues for decades after the abortion.[33] Medical knowledge is now able to confirm what the women have experienced – that women cannot deal with these traumatic circumstances until years later.[34] Therefore, it has taken time to deal with their circumstances and to be able to testify as to the effects of abortion. In light of these factual circumstances, Plaintiff's Motion was made within a reasonable amount of time.

12. In addition to the changes in factual conditions, there have been significant legal changes that justify Plaintiff's Rule 60 Motion. As discussed in Plaintiff's Rule 60 Motion and Supporting Brief which is incorporated herein, the United States Supreme Court has, over time, continued to restrict and undermine the legitimacy of *Roe v. Wade.* These cases have included, but are not limited to, *Webster v. Reproductive Services,*[35] *Planned Parenthood v. Casey,*[36] and *Washington v. Glucksberg.*[37] Even in its most recent ruling, the United States Supreme Court has recognized that " . . . this Court, in the course of a generation, has determined and then redetermined" what the

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[33] *See* Affidavits in Tab D and E of the Original Motion; *see also* Affidavit of Dr. Burke in Support of this Motion, Appendix, Tab B and Affidavit of Dr. Reardon in Support of this Motion, Appendix, Tab C.

[34] *See* attached Affidavit of Dr. Burke. The Affidavit of Dr. Burke explains that it can take women decades to recognize their grief, seek healing, and then overcome political and social stigmas in order to be able to speak out about the pain they have suffered from aborting a child.

[35] 492 U.S. 490 (1989).

[36] 505 U.S. 833 (1992).

[37] 521 U.S. 702 (1997).

basic constitutional protections are in the area of abortion and how they should be applied in particular circumstances.[38]

13. Similarly, in recent years, there have been significant changes in the law of federalism. Plaintiff's Original Motion and Supporting Brief discuss this issue in detail. However, it is sufficient to say at this juncture that significant changes were made between 1995 and 2000.[39] During this period, commentators across the country have been split on such issues as whether the United States Supreme Court was serious about expanding federalism, how it would be impacted by the fragile 5-4 split on the Court, what the parameters would be.[40]

14. In addition to changes in the decisional law, there have been significant changes in statutory law. Most notably are the statutory provisions that allow a mother to drop off an unwanted child with no threat of criminal prosecution.[41] In 2003, at least forty states now have such provisions. This is a legal change that gives women alternatives to abortion that were not available until just

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[38] Stenberg v. Carhart, 530 U.S. 914, 920 (2000).

[39] *See, e.g.,* United States v. Lopez, 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000).

[40] *See generally,* J. Harvie Wilkinson III, *The 2000 Justice Lester W. Roth Lecture: Federalism for the Future,* 74 S. CAL. L. REV. 523, 539-40 (2001) (stating the balance between national and state authority is "one of the new century's defining domestic struggles" and the answers are "neither absolute nor simple.").

[41] *See* Plaintiff's Original Rule 60 Motion at fns 42 and 43 discussing these statutes.

recently. In the majority of states, this was not available until 2001.[42]

FACTORS CONSTITUTING "REASONABLE TIME"

15. In addition, the courts have outlined the factors for determining whether Plaintiff filed the Rule 60 Motion within a reasonable time.[43] The first factor for determining what is a reasonable time is "the practical ability of the litigant to learn earlier of the grounds relied upon."[44] In 1973, the United States Supreme Court held that those trained in the respective disciplines of medicine, philosophy, and theology were unable to arrive at any consensus as to when life begins.[45] Even in the year 2000, the United States Supreme Court still did not know when human life begins recognizing the "controversial nature of the problem" and stating that there are "irreconcilable points of view."[46] It is clear that even in recent years the United States Supreme Court has struggled with the issue even with its access to the current medical and scientific information. On the other hand, Plaintiff, an uneducated person,[47] would not have known or have been capable of gathering this evidence to present to the Court. For Plaintiff, as well as the medical, scientific, and legal communities, it has been

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[42] There was one state in 1999; 13 more in 2000; 18 more in 2001; 7 more in 2002; and 1 more so far in 2003.

[43] *See* Traveler's Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404 (5th Cir. 1994).

[44] *Id.* at 1410 (*quoting* Ashford v. Stewart, 657 F.2d 1053, 1055 (9th Cir. 1981).

[45] Roe v. Wade, 410 U.S. 113, 181 (1973).

[46] *See* Stenberg v. Carhart, 530 U.S. 914, 920 (2000).

[47] *See* Plaintiff's Affidavit at Tab A of the Original Rule 60 Motion.

a developmental process with changes in factual and legal conditions not fully coming to fruition until recently. Therefore, Plaintiff did not have the "the practical ability . . . to learn earlier of the grounds relied upon," thereby meeting the first factor.

16. The abortion industry hides the true facts from individuals such as Norma McCorvey.[48] Although the United States Supreme Court in *Roe v. Wade* assumed that there would be a normal doctor-patent relationship between the women and the abortionists,[49] the real life experiences of the women who have had abortions, and the testimony of individuals who have worked in abortion clinics demonstrates that the abortion industry does not adequately protect women.[50] It is only years later that the

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[48] *See* Affidavit of Plaintiff Norma McCorvey, attached to the Original Motion in the Appendix, Tab A, pp. 1-14; see also the Affidavits of more than one thousand Post-Abortive Women, attached to the Original Motion in the Appendix, Tab B, pp. 15-1410; the Affidavit of Theresa Burke, Ph.D., attached in the Original Motion in the Appendix, Tab D, pp. 1422-1667; the Affidavit of David Reardon, Ph.D., attached to the Original Motion in the Appendix, Tab E, pp. 1668-1804, Exhibits to Affidavit of David Reardon, Ph.D., attached to the Original Motion in the Appendix, Tab E, pp. 1668-1804, Exhibits to Affidavit of David Reardon, Ph.D., Appendix, Tab E, pp. 1805-4307; Client Intake Records for Pregnancy Care Centers, attached to the Original Motion in the Appendix, Tab F, pp. 4308-5188; Affidavit of Carol Everett, former abortion provider, attached to the Original motion in the Appendix, Tab G, pp. 5189-5196.

[49] Roe v. Wade, 410 U.S. 113, 166 (1973).

[50] *See* Affidavit of Plaintiff Norma McCorvey, attached to the Original Motion in the Appendix, Tab A, pp. 1-14; see also the Affidavits of more than one thousand Post-Abortive Women, attached to the Original Motion in the Appendix, Tab B, pp. 15-1410; the Affidavit of Theresa Burke, Ph.D., attached in the Original Motion in the Appendix, Tab D, pp. 1422-1667; the Affidavit of David Reardon, Ph.D., attached to the Original Motion in the Appendix, Tab E, pp. 1668-1804, Exhibits to Affidavit of David Reardon, Ph.D., attached to the Original Motion in

(Continued on following page)

women realize that they were not properly informed of the physical, emotional, and psychological effects of abortion.[51]

17. The second factor in determining whether Plaintiff filed the Rule 60 Motion within a reasonable time is whether there is prejudice to the other parties.[52] There is, of course, no prejudice to the District Attorney Dallas County since Norma McCorvey is now agreeing with his 1970 position in the lawsuit that he has the authority under the Constitution to prosecute under the Texas Criminal Abortion Statute. In fact, the Dallas County District Attorney's Office has neither agreed to nor opposed the Motion. If the interests of his office were adversely affected, he would have opposed the Motion. The same is true for the State of Texas. The State certainly is not prejudiced by having a former adversary adopt its position. On the contrary, the State has the authority to protect women and children from abortion. The interests of the adverse parties are actually advanced rather than being prejudiced, and therefore, the second factor is met.

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the Appendix, Tab E, pp. 1668-1804, Exhibits to Affidavit of David Reardon, Ph.D., Appendix, Tab E, pp. 1805-4307; Client Intake Records for Pregnancy Care Centers, attached to the Original Motion in the Appendix, Tab F, pp. 4308-5188; Affidavit of Carol Everett, former abortion provider, attached to the Original motion in the Appendix, Tab G, pp. 5189-5196.

[51] *See* Affidavits of the Post Abortive Women, Appendix to the Original Motion, Tab B.

[52] Traveler's Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, 1410 (5th Cir. 1994). Even assuming arguendo that the Motion was not filed as promptly as it might have been, the courts will allow it where there is no detriment to the opposing party. *See* Federal Deposit Ins. Corp. v. Castle, 781 F.2d 1101 (5th Cir. 1986) (allowing motion because there was no detrimental reliance on part of opposing party); In re Pacific Far East Lines, 889 F.2d 242 (9th Cir. 1988) (allowing motion because there was no prejudice to opposing party).

18. The third factor in determining whether Plaintiff filed the Rule 60 Motion within a reasonable time concerns the court's interest in finality.[53] It is certainly true that there is an interest in finality in any judgment. But when a decision of the United States Supreme Court is involved, as opposed to litigation between private parties, the Supreme Court has made it clear the mere passage of time, even up to twelve years,[54] is not a bar to seeking justice. Justice outweighs the interest in finality.[55] By analogy, this is also true regarding Rule 60(b)(4) motions.[56] Courts have repeatedly stated that there is no time limit to Rule 60(b)(4).[57] Furthermore, the "doctrine of laches has no effect."[58] Conversely, "no court has denied relief under

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[53] Traveler's Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, 1410 (5th Cir. 1994).

[54] *See* Agostini v. Felton, 521 U.S. 203 (1997) (requiring Rule 60 after twelve years because it was no longer just); *see also* Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367 (1992) (allowing after ten years because it was no longer just); Railway Employees v. Wright 364 U.S. 642 (1961) (allowing after twelve years).

[55] The courts determined that "[t]he general purpose of Rule 60(b) . . . is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." Charter Township of Muskegon v. City of Muskegon, 303 F.3d 755 (6th Cir. 2002) (in striking the balance, justice outweighed finality with a judgment that was twenty-eight years old.) *accord* Stipelcovich v. Sand Dollar Marine, 805 F.2d 599, 604 (5th Cir. 1986) (finding the justice-function of the courts demands that it must yield, in appropriate circumstances, to the equities of the particular case in order that the judgment might reflect the true merits of the cause.'"

[56] *See* Jackson v. FIE, Corp. 302 F.3d 515, 523 (5th Cir. 2002) (*citing* numerous primary and secondary authority).

[57] *See id.* (reasoning that "the mere passage of time cannot convert an absolutely void judgment into a valid one").

[58] *Id.*

Rule 60(b)(4) because of delay."[59] Therefore, the third factor is met.

THREE-JUDGE COURT

19. This Court ruled that because "a single judge can entertain a post-judgment motion such as this, the Court declines to request . . . a three-judge court."[60] Plaintiff respectfully disagrees. Plaintiff agrees that the relevant provision is the pre-amendment version of 28 U.S.C. § 2284.[61]

20. Section 2284 begins by indicating that "Any one of the three judges of the court may perform . . . " This presupposes that a three-judge court has been convened. In fact, a three-judge court had been convened in the original case of *Roe v. Wade*. However, at the present time, all three of those judges are deceased. Thus, it is necessary to reconvene a three-judge court as Plaintiff requested in her prayer. Because this was not done, a single judge who is not part of the three-judge court does not have jurisdiction.

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[59] *Id.* (*quoting* Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind, 841 F.2d 646, 649 n.6 (5th Cir. 1988)).

[60] Order Denying Rule 60(b) Motion at 2 (June 19, 2003).

[61] The pre-amended version of 28 U.S.C. § 2284 provides: "Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A Single judge shall not appoint a master or order a reference, or hear and determine any application for interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The motion of the single judge shall be reviewable by the full court at any time before the final hearing."

21. Section 2284 also states that: "A single judge shall not . . . dismiss the action."[62] Plaintiff's Rule 60 Motion with Supporting Brief and over 5,000 pages of affidavits was summarily dismissed in two days without any time for analysis on the merits, response from the defendant, hearing on the various issues, or rebuttal from Plaintiff. Plaintiff also respectfully submits that it was error to classify her Rule 60 Motion as "simply whether the prior judgment should be reopened. It does not address final relief on the merits . . . "[63] The third request in Plaintiffs prayer was a request for "an order by the three-judge court that the judgment heretofore entered in favor of Plaintiff is vacated in light of changed legal and factual conditions because it is no longer just or equitable to give it prospective application."[64] This request sought final relief on the merits.

22. Section 2284 also requires that "[t]he action of a single judge shall be reviewable by the full court at any time before the final hearing." This is impossible since the request to reconvene the three-judge court was denied. Accordingly, the requirements of § 2284 were not met, and therefore, this Court did not have jurisdiction to rule on the Motion.

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[62] 28 U.S.C. § 2284; *see also* Ex Parte Poresky, 290 U.S. 30 (1933); Police Officers' Guide v. Washington, 369 F. Supp. 543 (D.D.C. 1973); New Jersey Chiropractic Assoc. v. State Bd. Of Medical Examiners, 79 F. Supp. 327 (D.N.J. 1948); Collins v. Bolton, 287 F. Supp. 393 (N.D. Ill. 1968).

[63] Order Denying Rule 60(b) Motion at 3 (June 19, 2003).

[64] Plaintiff's Original Rule 60 Motion at 17.

OTHER PROCEDURAL ISSUES

23. Although not part of this Court's decision, other procedural issues were raised in a footnote which will be briefly addressed.[65] At the time *Roe v. Wade* was originally decided, all of the procedural requirements had been met. The Rule 60 Motion merely seeks to re-examine the justice of the decision in light of the substantial changes in the factual and legal conditions that have occurred. No independent jurisdiction is needed to support a Rule 60(b) motion because the district court has continuing jurisdiction.[66]

24. By the plain language of Rule 60(b),[67] Plaintiff has standing to bring this Motion because she was a party in the "final judgment, order, or proceeding . . . "[68] The courts have followed this plain reading of the rule.[69] In essence, there is no question that Norma McCorvey was

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[65] Order Denying Rule 60(b) Motion at 8 (June 19, 2003).

[66] Charter Township of Muskegon v. City of Muskegon, 303 F.3d 755, 762 (6th Cir. 2002) (*quoting* Moore's FEDERAL PRACTICE § 60.84[1][a] (3d ed. 1997) that "It has been long established that no independent federal jurisdictional basis is needed to support a Rule 60(b) motion proceeding. A Rule 60(b) motion is considered a continuation of the original proceeding. "If the distrit court had jurisdiction when the suit was filed, it has jurisdiction to entertain a Rule 60(b) motion. This jurisdiction is not divested by subsequent events").

[67] Rule 60 states: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding . . . "

[68] FRCP 60(b).

[69] *See* National Acceptance Co. v. Frigidmeats, 627 F.2d 764, 766 (7th Cir. 1980). *See generally* 11 Charles Alan Wright, Arthur R. Miller, et al, FEDERAL PRACTICE AND PROCEDURE "Jurisdiction" § 2865 at 225-26 (West 1973) (stating it is well settled that one who was not a party lacks standing to bring a Rule 60(b) motion).

and is a party. If the State tried to reopen the case, Plaintiff would certainly have standing to object if her views had not changed.

25. Mootness – The United States Supreme Court specifically addressed this issue in the original case.[70] The appellee argued that Roe's case was moot because she and all other members of the class were no longer pregnant.[71] The Court rejected this argument stating "pregnancy provides a classic justification for a conclusion of non-mootness."[72] Plaintiffs case was not moot in 1973 and it is not today. As a party, she has standing under the Rule 60 to bring this Motion. In addition, this Court concluded that "Whatever else it may or may not have done, the Supreme Court's *Roe* decision thirty years ago ended this lawsuit between these parties."[73] The holding in *Roe* is a continuing order and as such has not "ended." The law in Texas still makes it a crime to abort a baby and the only reason that the law is not enforced is because of the continuing action in the *Roe* decision. The judgment is continuing with the continuing harmful daily effects on women and children as demonstrated in 5,437 pages of affidavits. Thus, the injustice continues on a daily basis and "injustice anywhere is a threat to justice everywhere."[74]

26. Judicial estoppel – The doctrine of judicial estoppel prohibits a party from assuming a contrary

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[70] Roe v. Wade, 410 U.S. 124 (1973).

[71] *Id.* at 124.

[72] *Id.* at 125.

[73] Order Denying Rule 60(b) Motion at 8 (June 19, 2003)..

[74] Martin Luther King, Letter from a Birmingham Jail (April 16, 1963).

position merely because his interests have changed and especially if it prejudices another party.[75] The doctrine exists to protect the court against fraud and abuse and is discretionary in nature.[76] Plaintiff is not using inconsistent arguments to gain advantage in litigation. On the contrary, she is using the Rule 60 Motion to bring before the court changes of factual and legal condition that were unavailable when the case was originally litigated. Plaintiff is acting in good faith. In addition, there is no prejudice to another party. In a Rule 60 Motion, the change in factual and legal condition should be the primary concern and not the position of the parties.[77] The parties seeking relief had agreed to the judgment.[78] However, the Supreme Court said the change in law was the important fact which should guide the court, not the parties' position on the issue which has now changed.[79] The Court rejected the argument that the parties were bound even by the contractual agreement stating: "In short, it was the Railway Labor Act, [in this case the constitution], and only incidentally the parties, that the District Court served in entering the consent decree now before us . . . the court must be free . . . the parties have no power to require the court continuing enforcement of rights the statute no longer gives."[80]

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[75] New Hampshire v. Maine, 532 U.S. 742, 749 (2001).

[76] 18 Moore's FEDERAL PRACTICE § 134.34 (*citing* New Hampshire v. Maine, 532 U.S. 742 (2001)).

[77] Railway Employees v. Wright, 364 U.S. 642 (1961).

[78] *Id.*

[79] *Id.* at 651-52.

[80] *Id.*

27. *Stare Decisis* – the United States Supreme Court specifically addressed the issue of *stare decisis* in *Agostini v. Felton*,[81] the only case dealing with overturning prior Supreme Court rulings directly by Rule 60. It stated that "The *stare decisis* doctrine does not preclude this Court from recognizing the change in its law . . . "[82] The Court went on to state that "*stare decisis* does not prevent us from overruling a previous decision where there has been significant change in or subsequent development of our constitutional law."[83] Nor does the "law of the case" doctrine apply where "adherence to that decision would undoubtedly work a 'manifest injustice'."[84]

28. Binding precedent – although under normal circumstances, United States Supreme Court precedent is binding upon this Court, a Rule 60 Motion means that

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[81] Agostini v. Felton, 521 U.S. 203 (1997).

[82] *Id.* at 235.

[83] *Id.* at 235-36. In supporting this proposition, the Court quoted United States v. Gaudin, 515 U.S. 506 (1995) stating that *stare decisis* may yield where a prior decision's "underpinnings [have been] eroded, by subsequent decisions of this Court"; Alabama v. Smith, 490 U.S. 794, 803 (1989) indicating that "later development of . . . constitutional law" is a basis for overruling a decision; and, Planned Parenthood v. Casey, 505 U.S. 833, 857 (1992) recognizing that a decision could be overruled where "development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking."

[84] Agostini v. Felton, 521 U.S. 203, 236 (1997). In granting the Rule 60 Motion, the Court surmised that lower courts had "relied on a legal principle that had not withstood the test of time." *Id.* at 237. Certainly with the substantial factual and legal changes that have taken place and the Affidavits from over a 1,000 women who have testified that abortion hurts women, this Court should no longer rely on a legal principle and premise that abortion helps women because it has not withstood the test of time and experience.

there have been changes in the factual and legal conditions that demand a change in ruling to prevent injustice. That is why it was critical to have granted Plaintiff's repeated requests for a hearing – fourteen in all – from the Original Motion.[85] This Court has both the power and duty

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[85] Following are the requests for evidentiary hearing in the Original Rule 60 Motion:

(a) Request for Evidentiary Hearing and Oral Argument, Motion Page 3.

(b) There has been a significant change in both the factual and legal landscapes surrounding this cause of action since the three-judge court's original ruling in this case. Motion Page 3, Paragraph 8.

(c) In respect to the factual allegations, there must be a factual determination made, an opportunity for the presentation of evidence, and a development of a full record. A thorough hearing and development of an adequate fact-finding record is necessary in order for the Court, and in the event of an appeal, the Appellate Court, to make fully informed, intelligent and well-reasoned decisions. Appellate Courts do not conduct their own fact-finding hearings; they rely upon the lower courts to develop a proper record. Motion, Page 3, Paragraph 8.

(d) The "threshold issue" 'is whether the factual landscape has changed since the Court's previous decision. Motion, Pages 3-4, Paragraph 9, Note 6. Factual matters should be decided by the trial court.' *Id.*

(e) "The importance of these cases and the issues raised in Plaintiffs Motion for Relief From Judgment warrant a full and complete factual exposition of changed factual circumstances. Accordingly, pursuant to the Federal Rules of Civil Procedure, Plaintiff hereby requests an evidentiary hearing and oral argument before the three judge court in order to present the evidence and legal authorities now available to the Court" Motion, Page 4, Paragraph 9.

(f) "Further the evidence as presented herein and as Plaintiff will present at the evidentiary hearing and oral argument as requested herein will show that the prior decision of the Court is clearly erroneous and would work a manifest injustice if applied prospectively." Motion, Page 5, Paragraph 12.

(Continued on following page)

(g) "New factual and legal evidence since the Court's decision in *Roe* and its companion case, *Doe*, as presented herein, in the Brief in Support of this Motion (incorporated herein by reference), and as will be presented to the Court at the evidentiary hearing requested by Plaintiff, now establishes that *Roe* and *Doe* have become and 'instrument of wrong'." Motion, Page 6, Paragraph 13, Note 16.

(h) "Just as *Brown v. Board of Education*, note 1 247 US 483 (1954), overturned *Plessy v. Ferguson*, note 2, 163 U.S. 537 (1896), because subsequent facts show that 'separate but equal' had become inherently unjust, the new facts revealed in this Motion (in the Brief in support of this Motion and which will be revealed in full detail at the evidentiary hearing requested herein) demonstrate that *Roe* is no longer just but inherently unjust and provide the decisional basis for the Court to vacate their previous ruling in this cause." Motion, Page 13, Paragraph 23.

(*i*) "New scientific and medical evidence and advances in technology since 1973, as described herein and *as will be more thoroughly presented at the evidentiary hearing* requested in this cause, clearly demonstrate that human life begins at conception and therefore the previous ruling in this cause should be vacated as it would be unjust to have prospective application." (Emphasis added) Motion, Page 13, Paragraph 24, 48 (See scientific medical analysis attached hereto in Appendix, Tab H, pp. 5197-5347; *see also* Agostini v. Felton, 521 U.S. 203 (1997).

(*j*) "The Affidavits attached hereto, the Brief in support of this Motion, and the *testimony to be presented at the evidentiary hearing* requested herein reveals new factual evidence that the abortion industry does not provide women with the protections of a true doctor-patient relationship" Motion, Page 14-15, Paragraph 26. (emphasis added).

(*k*) "New factual evidence regarding the physical and medical consequences on women, the result . . . is also available to the Court." Motion, Page 15, Paragraph 27.

(*l*) "In addition to the testimony of Plaintiff, Norma McCorvey, (both in the attached affidavit and her *live testimony to be given at the evidentiary hearing* requested herein), the attached women's affidavits from more than a thousand post-abortive women are the largest body of direct, sworn, factual evidence about the effects of abortion on women that has ever

(Continued on following page)

to hear that evidence of changed factual and legal conditions that would make a judgment unjust. It is also why the United States Supreme Court did not hesitate to grant the Rule 60 Motion in *Agostini* and overrule prior cases.[86]

DUE PROCESS

29. Plaintiff asserts that there has been a violation of her fundamental due process rights to notice and an opportunity to be heard on the issue of timeliness as well as the other issues raised in her Rule 60 Motion. Plaintiff requested a full hearing on all of her evidence and all the issues in her Motion and submitted 5,437 pages of evidence to support her Motion. However, this Court decided Plaintiffs Motion in two days without giving the other parties an opportunity to respond and without giving Plaintiff an opportunity to respond to any objections to the Motion. If the normal course of litigation had ensued, the State of Texas and the District Attorney would have had twenty days to respond.[87] If either party had raised the issue of unreasonable time, Plaintiff would have had

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been presented to the United States Courts." Motion, Page 15-15, Paragraph 28. (Emphasis added).

(*m*) The Women's Affidavits, the Brief in Support of this Motion, and *the new factual evidence*, previously unavailable to the Court that *will be presented at the evidentiary hearing requested* herein reveal . . . Items A through F. Motion, Page 16, Paragraph 29. (Emphasis added).

(n) "New facts previously unavailable to the Court have been revealed regarding the decision in *Doe v. Bolton* as well." Motion, Page 16-17, Paragraph 30.

[86] *See* the discussion in Agostini v. Felton, 521 U.S. 203, 235-36 (1997).

[87] *See* Local Rule 7.1(e).

fifteen days to respond to their attack with replies, including argument and affidavits if necessary.[88]

30. This Court candidly acknowledges that its decision to deny the Motion was based on the mere passage of thirty years. This was clear error based on that premise as well as a denial of due process. However, evidentiary hearings are proper where it will assist the plaintiff as well as the appellate court.[89] A hearing would have given this Court the benefit of all the facts as well as the benefit to the appellate court in reviewing the case.

THE EVIDENCE PRESENTED WAS SUFFICIENT TO GRANT THE MOTION

31. In the alternative, Plaintiff asserts that this Court should have granted the Motion on its merits if the Court had jurisdiction as part of a three-judge court. The Motion, Supporting Brief, and 5,437 pages of affidavits and expert testimony were sufficient to grant the Motion and vacate the original judgment as Plaintiff requested in her prayer for relief. A district court has discretion not to

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[88] *See* Local Rule 7.1(f).

[89] Clarke v. Burkle, 570 F.2d 824 (8th Cir. 1978). The court explained: "We do not say that an evidentiary hearing in connection with the Rule 60(b) motion would necessarily have done the plaintiff any good. However, to have held the hearing would have consumed little time and effort, and in ruling upon the motion and amendments, the district court would have had the benefit of all of the facts, and we would have had the benefit of those facts in reviewing the action of the district court on appeal. In our opinion the action of the trial court in failing to hold a hearing legally amounted to an abuse of discretion, and we think that a hearing must now be held by the district court." *Id.* at 832.

hear oral testimony on motions.[90] It is not an abuse of discretion where "an evidentiary hearing was unnecessary in view of the detailed record . . . "[91] In this case, Plaintiff provided the most detailed information that any court has received on the issue. It included its Motion and Supporting Brief with 5,437 pages of documentation. Especially in the absence of any objection by opposing parties, the Motion should have been granted. If the Court were unconvinced by the massive evidence presented, due process would then require a hearing with evidence to address the Court's *sua sponte* objections.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff Norma McCorvey respectfully prays for the following:

1. Grant this Motion for Reconsideration and set aside the Court's Order of June 19, 2003;
2. Grant the request for a three-judge panel;
3. Grant a hearing as requested in the Original Motion, or, in the alternative,
4. Grant Plaintiff's Rule 60 Motion based on the substantial accompanying evidence that to apply *Roe v. Wade* in the future would be unjust and inequitable.

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[90] Gary W. v. State of Louisiana, 601 F.2d 240, 244 (5th Cir. 1979).

[91] *Id.*

APPENDIX:

Tab A Affidavit of Allan E. Parker

Tab B Affidavit of Dr. Theresa Burke, Ph.D.

Tab C Affidavit of Dr. David C. Reardon, Ph.D.

Tab D Summary of Medical and Scientific Research Concerning the Affects of Abortion on Women

Respectfully Submitted,

THE JUSTICE FOUNDATION
(Formerly Texas Justice Foundation, and still doing business in Texas as the Texas Justice Foundation)
Attorneys for Plaintiff
Norma McCorvey, formerly known in this cause as Jane Roe

/s/ Allan E. Parker

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CERTIFICATE OF SERVICE

A true copy of the above and foregoing has been hand-delivered to: The Texas Attorney General, 300 W. 15th Street, Austin, Travis County. and the District Attorney for Dallas County, Frank Crowley Courts Building, 133 N. Industrial Blvd., LB 19, Dallas, Dallas County, Texas.

SIGNED on this the 3rd day of July, 2003.

/s/ Allan E. Parker
Allan E. Parker, Jr.

CERTIFICATE OF CONFERENCE

I hereby certify that I contacted the office of Bill Hill, District Attorney for Dallas County, Texas on June 30, 2003. Bill Hill's Office stated that he neither agreed to or opposed the Motion.

On three separate working days since the Order of June 19, 2003, Plaintiffs counsel has left telephone messages with Attorney General Greg Abbott's scheduler or Texas Solicitor General Ted Cruz requesting a consultation concerning this Motion for Reconsideration, either in person or by telephone. Such a request was made for the last time on July 2, 2003, the day before the Motion was due. Plaintiffs counsel has received no response from the State of Texas at this time. Texas Solicitor General Ted Cruz was consulted prior to the original Rule 60 Motion and took the position that the State was not a party.

SIGNED on this the 3rd day of July, 2003.

/s/ Allan E. Parker
Allan E. Parker, Jr.

No. 03-10711

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Norma McCorvey, formerly known as JANE ROE,
Plaintiff-Appellant

v.

WILLIAM "BILL" HILL, Dallas County District Attorney, As Successor in Office to Henry Wade
Defendant-Appellee.

On Appeal from the United States District Court
For the Northern District of Texas

PETITION FOR REHEARING EN BANC

THE JUSTICE FOUNDATION
(Formerly Texas Justice Foundation, and still doing business in Texas as the Texas Justice Foundation)
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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiff-Appellant:

Norma McCorvey

Plaintiff-Appellant Represented by:

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Other Potentially Interested Parties:

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Ted Cruz
Solicitor General for the State of Texas
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/s/ Allan E. Parker, Jr.
Allan E. Parker, Jr.,
Lead Counsel

STATEMENT OF IMPORTANCE

TO THE HONORABLE COURT:

NORMA MCCORVEY, formerly known in this Court as Jane Roe of *Roe v. Wade*, the Plaintiff-Appellant (hereinafter referred to as "McCorvey") respectfully requests a rehearing en banc of her Rule 60 Motion which was denied on September 14, 2004, based solely on the legally and factually erroneous conclusion that the Texas abortion

statute(s), which are the subject of the Rule 60 Motion, have been repealed by implication through subsequent actions of the Texas Legislature regulating and restricting abortions.

Pursuant to FED. R. APP. P. 35, McCorvey files this Petition to reconsider the Court's decision of September 14, 2004. This case involves questions of exceptional national importance due to the changed legal and factual conditions that show *Roe v. Wade* is no longer just and harms women all across this nation. As Judge Jones correctly states:

> In sum, if courts were to delve into the facts underlying *Roe*'s balancing scheme with present-day knowledge, they might conclude that the woman's "choice" is far more risky and less beneficial, and the child's sentience far more advanced, than the *Roe* Court knew. . . . [1]

Judge Jones went on to say:

> At the same time, because the Court's rulings have rendered basic abortion policy beyond the power of our legislative bodies, the arms of representative government may not meaningfully debate McCorvey's evidence. The perverse result of the Court's having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter . . . [2]

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[1] Panel Opinion at 11 (September of 14, 2004) (Jones, J. concurring). *See* attached Exhibit A.

[2] *Id.* at 11-12.

Judge Jones concludes:

> One may fervently hope that the Court will someday acknowledge such developments and re-evaluate *Roe* and *Casey* accordingly. That the Court's constitutional decision making leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer . . .[3]

In this case of exceptional national importance that affects over a million women and unborn babies each year, no meaningful discussion of the evidence has occurred because the Rule 60 Motion was denied for mootness on the basis that the Texas abortion statutes are repealed by implication, an argument raised for the first time by this Court, without benefit of briefing. McCorvey respectfully disagrees.

This Court's majority and concurring opinions acknowledge that the trial court erred in determining that the Rule 60 motion was *per se* untimely due to the length of time since the original decision. They also acknowledge that the affidavit and other evidence may well raise a substantial issue as to whether the requisite changed circumstances do in fact exist in this case, calling for invocation of principles of justice and fairness to modify the original ruling under Rule 60. This Court's opinions further confirm that based on the procedural conundrum created by the panel's decision regarding abortions and the life and liberty issues involved in this case, there may very well be no avenue within our judicial system, other than the present case, to allow a reconsideration of the incredibly important legal, societal, and moral issues raised by this case.

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[3] *Id.* at 12.

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STATEMENT OF THE ISSUES

Two issues are presented for rehearing:

1. Did the panel err in its decision on mootness because no independent jurisdictional basis is needed for a Rule 60 Motion by a Party?

2. Did the panel err in its decision on mootness because Texas has consistently banned or restricted abortion except to save the life of the mother to the full extent of the constitution and therefore has not repealed its ban by implication?

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

On June 17, 1970, a three judge court declared the Texas abortion laws unconstitutional.[4] On January 22, 1973, the United States Supreme Court affirmed.[5]

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[4] *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970) (hereinafter "District Court Roe").

[5] *Roe v. Wade*, 410 U.S. 113 (1973) (hereinafter "Roe").

On June 17, 2003, McCorvey filed a Rule 60 Motion for Relief from Judgment based on *Agostini v. Felton*.[6] Two days later, on June 19, 2003, the district court denied the Rule 60 and later denied McCorvey's Motion for Reconsideration.

An appeal was timely filed with this Court on October 9, 2003. McCorvey argued that the district court abused its discretion because: (a) it ignored this Court's recent directive in *Collins v. Morgan, Stanley Dean Witter*[7] for proper consideration of Rule 60 motions; (b) the motion was timely filed, her evidence was legally sufficient and uncontradicted, and other procedural requirements had been met; (c) an evidentiary hearing considering the significant changes in the factual and legal conditions should have been held; and, (d) it lacked jurisdiction to enter an order denying a three-judge court.

On September 14, 2004, the panel of Judges Jones, Wiener, and Prado dismissed the appeal and held that (a) although the original action was tried by a three-judge court, the Rule 60(b) motion was not a matter for a three judge court;[8] (b) the district court erred in concluding that a 30-year delay was too long; (c) the case was moot even though the district court did not address that issue;[9] and, (d) the district court did not abuse its discretion in denying an evidentiary hearing.[10] The panel did not address the issue of whether 5,437 pages of uncontroverted evidence

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[6] 521 U.S. 203 (1997).

[7] 224 F.3d 496 (5th Cir. 2000).

[8] Panel Opinion at 3 (September 14, 2004).

[9] Panel Opinion at 6, n.4 (September 14, 2004).

[10] Panel Opinion at 6-7 (September 14, 2004).

was legally sufficient to compel granting the Motion. The Court held that the Texas statutes criminalizing abortion had been repealed by implication.[11]

STATEMENT OF FACTS

McCorvey presented over 5,000 pages of sworn, uncontroverted evidence of substantial changes in legal and factual conditions which demonstrate that *Roe* is a live controversy and no longer just. In addition, in this Petition, McCorvey traces the legislative provisions that demonstrate the Texas abortion statutes were not repealed either expressly or by implication.

ARGUMENT

I. THE PANEL ERRED BECAUSE NO INDEPENDENT JURISDICTION IS NEEDED TO SUPPORT A RULE 60 MOTION, AND THEREFORE, MCCORVEY HAS MET ALL PROCEDURAL REQUIREMENTS.

At the time *Roe v. Wade* was originally decided, all of the procedural requirements had been met. The Rule 60 Motion merely seeks to re-examine the justice of the decision in light of the substantial changes in the factual and legal conditions that have occurred. No independent jurisdiction is needed to support a Rule 60(b) motion because the district court has continuing jurisdiction.[12] In

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[11] Panel Opinion at 5-6 (September 14, 2004).

[12] *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755, 762 (6th Cir. 2002) (*quoting* MOORE'S FEDERAL PRACTICE § 60.84[1][a] (3d ed. 1997) that "It has been long established that no independent federal jurisdictional basis is needed to support a Rule

(Continued on following page)

fact, it is only the Supreme Court's decision in *Roe* which prevents Texas from enforcing its law banning abortion except to save the life of the mother. Therefore, there are no jurisdictional impairments. By the plain language of Rule 60(b),[13] McCorvey has standing to bring this Motion because she was a party to the "final judgment, order, or proceeding . . . "[14] The courts have followed this plain reading of the rule.[15] In essence, there is no question that Norma McCorvey was and is a party.

II. THE PANEL ERRED IN ITS DECISION ON MOOTNESS BECAUSE TEXAS HAS CONSISTENTLY BANNED OR RESTRICTED ABORTION TO THE FULL EXTENT OF THE *ROE* CONSTITUTIONAL LIMITATIONS, AND THEREFORE, THE TEXAS ABORTION STATUTES HAVE NOT BEEN REPEALED BY IMPLICATION.

McCorvey contends that the Texas abortion statutes have not been repealed expressly or by implication. The

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60(b) motion proceeding. A Rule 60(b) motion is considered a continuation of the original proceeding. "If the district court had jurisdiction when the suit was filed, it has jurisdiction to entertain a Rule 60(b) motion. This jurisdiction is not divested by subsequent events.").

[13] FED. R. CIV. P. 60(b) states: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding . . . "

[14] FED. R. CIV. P. 60(b).

[15] *See National Acceptance Co. v. Frigidmeats*, 627 F.2d 764, 766 (7th Cir. 1980). *See generally* 11 Charles Alan Wright, Arthur R. Miller, et al, FEDERAL PRACTICE AND PROCEDURE "Jurisdiction" § 2865 at 225-26 (West 1973) (stating it is well settled that one who was not a party lacks standing to bring a Rule 60(b) motion).

panel held that "because the statutes declared unconstitutional in *Roe* have been repealed, McCorvey's 60(b) motion is moot."[16] McCorvey respectfully disagrees. For the first time in this process, the panel raised the issue of the effectiveness of the Texas statutes. The argument originated in an amicus brief, but on February 23, 2004, the panel denied the motion to file the amicus brief. Therefore, this is the first opportunity that McCorvey has had to address the issue of mootness and the status of the abortion statutes.[17]

Historically, Texas has had statutory provisions against abortion dating back to 1854.[18] After *Roe* was decided in 1973, the Penal Code was revised, but the abortion provisions were expressly *not* repealed. The Disposition Table made it clear that certain articles were *unrepealed* even though they were not being transferred into the new Code. In fact, the Table was entitled "Disposition of **Unrepealed** Articles of the Texas Penal Code of 1925 and Vernon's Texas Penal Code." (emphasis added) The instructions for that Disposition Table stated the Legislature was giving new official citations of unrepealed articles.[19] The historical note

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[16] Panel Opinion at 6 (September 14, 2004).

[17] The panel raised this issue *sua sponte*. The request for oral argument was denied.

[18] *Jacobs v. Theimer*, 19 S.W.2d 846, 851 (Tex. 1975) (Pope, J. dissenting and contending Texas had a long standing rule against abortion which had "stood since 1854").

[19] The instructions for the Disposition Table stated in relevant part: "Pursuant to the authority granted by Section 5 of Chapter 399, Acts of the 63rd Legislature, the Texas Legislative Council has compiled the following table showing the new official citations of unrepealed articles of the 1925 Texas Penal Code and the new classifications of unrepealed statutes compiled as articles of Vernon's Texas Penal Code." *See* attached Exhibit B.

states they are unconstitutional because of *Roe v. Wade.* Thus, the Legislature has directly stated that the abortion articles are unrepealed.

In 1974, then-Attorney General John Hill wrote an opinion concerning the present status of Texas abortion laws.[20] After *Roe,* he concluded that "[t]herefore, there presently are no **effective** statutes of the State of Texas against abortion, per se."[21] (emphasis added) The Attorney General never said that they were repealed, he only said that the provisions were not "effective" because of the *Roe v. Wade* decision.

Furthermore, the Attorney General was asked that since *Roe v. Wade* declared the Texas statutes unconstitutional, "[W]hat guidelines and standards should now be used in reference to 'abortions' in this State?" The Attorney General outlined the types of regulations permitted under the Supreme Court opinion.[22] He said that "sponsors . . . should be guided by the principles discussed herein. . . ."[23] The legislature passed legislation based on the constitutional limitations of *Roe v. Wade* and the Attorney General's guidelines after the decision.

While the United States Supreme Court has not authoritatively resolved the issue of revival, it has been its practice[24] and "weighs in favor of revival."[25] Several state

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[20] OP. TEX. ATT'Y GEN. No. H-369 (1974).

[21] *Id.* at 3.

[22] *Id.* at 4-13.

[23] *Id.* at 13.

[24] *See generally* Treanor & Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes,* 93 Colum. L. Rev. 1902, 1908-09

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courts have explicitly addressed the revival issue, and with one exception, they have concluded that invalidated statutes are immediately enforceable when the invalidating decision is overturned.[26] Prior to the overruling decision, an invalidated statute "is dormant, but not dead."[27] Although few cases are on point, one court has stated:

> There are comparatively few cases dealing squarely with the question before us, but they are unanimous in holding that a law once declared unconstitutional and later held to be constitutional does not require reenactment by the legislature in order to restore its operative force. They proceed on the principle that a statute declared unconstitutional is void in the sense that it is inoperative or unenforceable, but not void in the sense that it is repealed or abolished; that so long

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(1993) (recognizing United States Supreme Court cases, state court cases, and almost every other commentators). *Id.* at 1908-17.

[25] Treanor & Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 Colum. L. Rev. 1902, 1911 (1993); *see also* Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 Tex. L. Rev. 269, n.63 (1999) (commenting on the Treanor & Sperling article and stating that "an invalidated statute simply becomes dormant, ready to be enforced as soon as a court finds that it is no longer invalid"); Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without Roe: Applying the Doctrine of Implied Repeal to Abortion*, 11 ST. LOUIS U. PUB. L. REV. 385, 392 (1992) (stating overwhelming consensus is that statutes automatically revive). (Attached as Exhibit C.)

[26] Treanor & Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 Colum. L. Rev. 1902, 1913-14 n.50 *(citing Pierce v. Pierce*, 46 Ind. 86, 95 (1874); *State ex. Rel. Badgett v. Lee*, 22 So. 2d 804, 806 (Fla. 1945); *Christopher v. Mungen*, 55 So. 273, 280 (Fla. 1911); *State v. O'Neill*, 126 N.W. 454, 454 (Iowa 1910); *McCollum v. McConaughy*, 119 N.W. 539, 541 (Iowa 1909); *State v. Douglas, 278* So. 2d 245, 491 & n.6 (La. 1973); *State ex. Rel. Moore v. Molpus*, 578 So. 2d 624, 638 (Miss. 1991)).

[27] *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952).

> as the decision stands the statute is dormant but not dead; and that if the decision is reversed the statute is valid from its first effective date. (citations omitted).[28]

By statute, Texas presumes that the intention of its Legislature is to be in "compliance with the constitutions of this state and the United States . . . "[29] and that "a just and reasonable result is intended."[30] If *Roe* is vacated on the grounds that it is no longer just, the just and legal result would be to revive the Texas law. Furthermore, "in interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy."[31] The "evil" Texas has consistently sought to avoid is unlimited abortion on demand. Texas purpose has always been to limit abortion as much as possible. The statutes are "the law of this state and shall be liberally construed to achieve their purpose and to promote justice."[32] The heart of Rule 60 is to do justice in light of the changed factual and legal conditions. If *Roe* is no longer just, Texas should not be punished for being mandated to follow the decision. Finally, since repeal by implication is disfavored, there is no irreconcilable conflict between the older and new statutes. The old "*Roe*" statutes allowed some abortions to save the life of the mother. The allowable abortions would still be governed by

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[28] *Id.; see also* 39 OP. ATT'Y GEN. 22 (1937) (stating unconstitutional statute remains on the "statute books" and is valid from the date it became effective).

[29] TEX. GOV'T CODE § 311.021.

[30] *Id.* § 311.021(3).

[31] *Id.* § 312.005.

[32] *Id.* § 312.006.

the newer statutes which are silent on the purpose for abortions.[33]

The issue of subsequent legislation becomes important concerning whether the statutory provisions were repealed by implication. The Legislature may repeal a statute either expressly or by implication.[34] Whether the repeal is express or implied is a question of legislative intent.[35] It is not within the power of the court to repeal legislation as that function is within the legislative power.[36] Federal courts particularly have no power to repeal state laws and would be bound by Texas interpretation of its intent since that is a question of state law.[37] It is a well known principle[38] that repeals by implication are not favored.[39] There

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[33] Unlike the statute in *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990), Texas had an exception to save the life of the mother. *Weeks* has been criticized for its flawed analysis. *See generally* Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without Roe: Applying the Doctrine of Implied Repeal to Abortion*, 11 ST. LOUIS U. PUB. L. REV. 385 (1992).

[34] *Gordon v. Lake*, 163 Tex. 392, 356 S.W.2d 138, 139 (1962).

[35] *Fisher v. State*, 830 S.W.2d 831 (Tex. App. – San Antonio, 1992); *see also* TEX. GOV'T CODE § 312.005 (1998) and its interpretive case law ns. 70-76.

[36] TEX. CONST. art. 3, § 1 states that the legislative power is vested in the Texas Legislature and TEX. CONST. art. 3, § 43 states that the Legislature is responsible for revising the laws and particular subject.

[37] *See generally* Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without Roe: Applying the Doctrine of Implied Repeal to Abortion*, 11 ST. LOUIS U. PUB. L. REV. 385, 394 (1992). The author also admonishes that "[t]he doctrine of implied repeal should not be used as a backdoor effort to exercise a power of judicial repeal of statutes that, under our system of separation of powers, cannot and does not exist." *Id.* at 402.

[38] *Bank of Texas v. Childs*, 615 S.W.2d 810, 820 (Tex. Civ. App. – Dallas 1981).

must be a "positive repugnance" between the old and new provisions to repeal by implication.[40] Absent an express repeal, the court must presume that the legislature intended the old statute to remain in operation.[41] Furthermore, it is presumed that the Legislature enacted a statute with complete knowledge of the existing law.[42] **The repeal of a statutory provision by implication will not be declared unless the legislative intent to repeal is so clear and apparent as to leave no room for either doubt or speculation.**[43] Here, the Legislature is responding to what the Supreme Court has done, and not to what the Legislature has done in prior sessions. This is a significant difference.

It is not reasonable to assume that the Legislature would repeal by implication what it expressly refused to

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[39] *See, e.g., Baugh v. Taylor,* 117 F.3d 197 (5th Cir. 1997); *Acker v. Texas Water Commission,* 790 S.W.2d 299, 301 (Tex. 1990); *Standard v. Sadler, 383* S.W. 2d 391 (Tex. 1964); *Gordon v. Lake,* 163 Tex. 392, 356 S.W.2d 138, 139 (1962); *Dendy v. Wilson,* 142 Tex. 460, 179 S.W.2d 269 (1944).

[40] *E.g., Acker v. Texas Water Commission,* 790 S.W.2d 299, 301 (Tex. 1990); *Winterman v. McDonald,* 129 Tex. 275, 102 S.W.2d 167, *reh'g denied,* 129 Tex. 275, 104 S.W.2d 4 (1937).

[41] *Chapman v. Southern Hospitalities, Inc.,* 624 S.W.2d 320, 322 (Tex. App. – Tyler 1981); *Folliott v. Bozeman,* 526 S.W.2d 577, 580 (Tex. Civ. App. – Corpus Christi 1975, writ ref'd n.r.e.). *See generally,* 67 TEX. JUR. 3d *Statutes* § 65 (2003) **(stating principle that "where there is no express repeal, the presumption is that in enacting a new law the legislature intended the old statute to remain in operation").**

[42] *E.g. Acker v. Texas Water Commission,* 790 S.W.2d 299 (Tex. 1990).

[43] *Samaniego v. Arguelles,* 737 S.W.2d 88, 89 (Tex. App. – El Paso 1987); *see also Allen v. Mauro,* 733 S.W.2d 228, 234 (Tex. App. – El Paso 1984).

repeal. In essence, it has been compelled to do so by the *Roe* decision.[44] More logical is the interpretation that the Legislature has followed the guidelines by the Attorney General since 1974 in regulating abortion and providing administrative, civil, and criminal penalties to the full extent of the law. If *Roe* were vacated, Texas would consider its original ban revived. As one author of an article directly on point states: "[T]hey should generally be viewed as measures intended to fill a gap created by *Roe* rather than as impliedly repealing pre-*Roe* legislation."[45] For example, Texas requires parental notification;[46] it denies funding to provide abortion services unless the mother's life is in danger;[47] it requires informed consent and provides penalties for violations;[48] it does not require employers to pay for health insurance benefits for abortion unless the life of the mother is endangered;[49] private entities are not required to make facilities available for abortion unless the life of the mother is in immediate danger;[50] and, it provides criminal and administrative

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[44] *See generally* Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without Roe: Applying the Doctrine of Implied Repeal to Abortion*, 11 ST. LOUIS U. PUB. L. REV. 385 (1992). (See attached as Exhibit C.)

[45] *Id.* at 402.

[46] TEX. FAM. CODE § 33.001 to § 33.011.

[47] TEX. HEALTH & SAFETY CODE § 32.005; *see also Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 255 (Tex. 2002) (funding restrictions were constitutional and do not discriminate on the basis of sex and are rationally related to a legitimate governmental purpose).

[48] TEX. HEALTH & SAFETY CODE § 171.001 to § 171.005 (Women's Right to Know Act), and § 171.011 to § 171.018 (requiring informed consent and penalties for violations).

[49] TEX. LAB. CODE § 21.107.

[50] TEX. OCC. CODE § 103.004.

penalties for physicians who perform or procure criminal abortions.[51] All of these provisions show a desire to restrict abortions to the absolute minimum as required by *Roe* and its progeny and to not fund abortions.

The panel itself noted an exception to mootness applies "where there is evidence, or a legitimate reason to believe, that the state will reenact the statute or one that is substantially similar."[52] Yet the panel ignores all the subsequent legislation Texas has adopted whenever the new Supreme Court interpretations allow restrictions. History makes it clear that Texas would enforce its existing law since it has never repealed it in any way. Furthermore, with all pro-life executive and legislative leaders and platform, there is clearly some evidence to believe Texas authorities would either enforce the existing ban or quickly reenact it, if necessary, if *Roe* were overturned. Certification to the Texas Supreme Court could be made but is unnecessary in light of the clear non-repeal. McCorvey further contends that the case is not moot because it comes within three other exceptions to the mootness rule. The first exception is "capable of repetition, yet evading review." The United States Supreme Court specifically addressed this issue in this original case.[53] In 1973, the appellee argued that McCorvey's case was moot because she was no longer pregnant.[54] The Court rejected

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[51] TEX. OCC. CODE § 164.052. (prohibiting physician to perform or procure a criminal abortion or aids, abets, or attempts one); § 164.055 (allowing the board to take disciplinary action concerning abortion); and, § 201.502 (refusing, revoking, or suspending a chiropractors license for procuring or assigning in procuring an abortion).

[52] Panel Opinion at 5, n.3 (September 14, 2004).

[53] *Roe v. Wade*, 410 U.S. 124 (1973).

[54] *Id.* at 124.

this argument stating "pregnancy provides a classic justification for a conclusion of nonmootness" and "capable of repetition, yet evading review."[55] Judge Jones is correct in her concurring opinion that under the panel's interpretation "the Court will never be able to examine its factual assumptions on a record made in court," and therefore, no judicial forum exists whereby McCorvey's evidence "could be aired."[56] Thus, it would evade review, contrary to *Roe*'s mootness exception previously established in this case. In essence, such a ruling completely undermines Rule 60.[57] Any court which follows the substantive rule of *Roe,* with or without reservations, should, in the interest of true justice, also follow *Roe*'s relaxed mootness rule.

The second exception to mootness is "voluntary cessation of the challenged practice."[58] The holding in *Roe* is a continuing quasi-injunctive order. In *Roe,* the Supreme Court did not grant injunctive relief because the decision would and did have the same effect as an injunction. The Court said "we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes are unconstitutional."[59] Prosecutors in the State of Texas have respectfully, but voluntarily, given credence to the Court's decision. Prosecutors could change their mind and prosecute abortionists. The only way to get relief from a quasi-injunctive order is Rule 60 relief.

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[55] *Id.* at 125.

[56] Panel Opinion at 11 (September 14, 2004) (Jones, J. concurring).

[57] *See Agostini v. Felton,* 521 U.S. 203 (1997).

[58] *See* John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW § 2.12 at 72 (7th ed. 2004).

[59] *Roe v. Wade,* 410 U.S. 113, 165 (1973).

The third exception to mootness is collateral consequences.[60] "Even though the primary dispute has settled through the passage of time, if there are collateral consequences to one of the parties – even if they are quite minor – the controversy is not moot."[61] As McCorvey has proved with her uncontroverted evidence, there are tremendous collateral consequences to the parties. Like the *Roe* Court, she once supported abortion until she worked in abortion clinics and the reality of abortion changed her mind.[62] McCorvey has suffered guilt, shame, public humiliation, anguish of soul, and what she believes is complicity in murder knowing that her case has caused the death of over 43 million babies. She has also suffered the pain of the women who have made sworn statements of the harm that abortion has caused them. The State of Texas has suffered the consequences of not being able to ban abortion which it had done since 1854. The women have suffered the collateral consequences of this ruling through physical, emotional, and psychological harm. The nation has suffered the collateral consequences as this decision has polarized Americans, influenced the political process and even the appointment of judges. Thus, both parties to this lawsuit and the nation have felt the collateral consequences of *Roe v. Wade*. Justice never sleeps, and it demands re-evaluation in light of new conditions.

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[60] *See* John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW § 2.12 at 74 (7th ed. 2004).

[61] *Id.* at 75.

[62] *See* Affidavit of Norma McCorvey attached as Exhibit D; *see also* Affidavit of Sandra Cano, "Doe" of *Doe v. Bolton*, attached as Exhibit E. (Both attached to original Rule 60 Motion.)

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant Norma McCorvey respectfully prays for the following:

1. Grant this Motion for Rehearing and set aside the district court's Order of June 19, 2003 and the panel's order of September 14, 2004;

2. Grant the request for a three-judge panel;

3. Grant a hearing as requested in the Original Motion, or, in the alternative,

4. Grant Appellant's Rule 60 Motion based on the substantial accompanying evidence that to apply *Roe v. Wade* in the future would be unjust and inequitable.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A true copy of the above and foregoing has been mailed to the District Attorney for Dallas County, Frank Crowley Courts Building, 133 N. Industrial Blvd., LB 19, Dallas, Dallas County, Texas.

SIGNED on this the 27th day of September, 2004.

/s/ Allan E. Parker, Jr.
Allan E. Parker, Jr.

CERTIFICATE OF COMPLIANCE

1. This Petition complies with the type-volume limitation of FED R. APP. P. 32(a)(7) because it is within fifteen pages excluding the parts of the Petition exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This Petition complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font.

SIGNED this the 27th day of September, 2004.

/s/ Allan E. Parker, Jr.
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Lead Counsel

[LOGO] **The Justice Foundation**

[Address Omitted In Printing]

October 8, 2004

United States Court of Appeals
Fifth Circuit
Office of the Clerk
600 Camp Street
New Orleans, LA 70130

RE: ***No. 03-10711 McCorvey v. Hill***
USDC No. 3:03-CV-1340-N
Supplemental Material After Date of Petition For Rehearing En Banc to be Brought to the Court's Attention

To The Court:

Appellant McCorvey's Petition for Rehearing in this case was filed with the Court on September 28th. On October 5, 2004, The Center for Reproductive Rights released a new report called "What If Roe Fell? The State-by-State Consequences of Overturning *Roe v. Wade*". A copy of the cover pages and the Texas analysis is attached.

The analysis of this "leading legal advocacy organization" for abortion is relevant to and contradicts footnote 3 of the Panel Opinion which states there is no "reasonable belief that if [Texas] would reenact the statutory provisions struck down in *Roe*."[1] This major pro-abortion legal advocacy group states:

> "Given the current composition of the [Texas] legislature and the State's history of regulating

[1] Panel Opinion at page 5. n. 3.

> abortion heavily, it is likely that Texas would enact a new statute banning abortion. **CONCLUSION**: The United States Court of Appeals for the Fifth Circuit held in 2004 [in this case] that Texas' pre-Roe abortion ban had been repealed by implication. However, the legislature *is likely to enact a new abortion ban.*" (Emphasis supplied)[2]

Thus, the leading pro-abortion legal group agrees with McCorvey's Petition that Texas policy and intent is to ban abortion if constitutionally permitted, thus, the issue is not moot in accordance with Footnote 3's recognized exception to the mootness doctrine.

Sincerely,

/s/ Allan E. Parker
Allan E. Parker, Jr.
CEO

AEP:ea

cc: Dolena Westergard
R. Clayton Trotter
Linda Boston Schlueter
Jimmy D. "Skip" Hulett
Kathleen Cassidy
Sharon Blakeney
Harold Cassidy
Robert Baxter

[2] Attached.

What if *Roe* Fell?

The State-by-State Consequences of Overturning *Roe v. Wade*

SEPTEMBER 2004
CENTER FOR REPRODUCTIVE RIGHTS
120 WALL STREET
NEW YORK, NY 10005
WWW.REPRODUCTIVERIGHTS.ORG

The Center for Reproductive Rights

The Center for Reproductive Rights is the leading legal advocacy organization dedicated to promoting and defending women's reproductive rights worldwide. Founded in 1992 (as the Center for Reproductive Law and Policy), the Center has defined the course of reproductive rights law in the United States with significant victories in courts across the country, including two landmark cases in the U.S. Supreme Court: *Stenberg v. Carhart* (2000), and *Ferguson v. City of Charleston* (2001). Using international human rights law to advance the reproductive freedom of women, the Center has strengthened reproductive health laws and policies across the globe by working with more than one hundred organizations in 45 countries.

The State Legislative Program

The Center's state legislative program works with state legislators, governors, partner organizations, lobbyists, and coalitions to prevent the passage of laws that would harm women's reproductive health and to promote the passage of positive laws. The program monitors and analyzes pending legislation, providing an "early warning system" on bills that may require legal challenges. It also

offers model legislation, legal tools, and strategic advice to over 650 state contacts.

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The Center for Reproductive Rights is a charitable and nonpartisan organization and does not support any candidate or political party. The Center's intention in releasing this study is solely to educate advocates on the legal ramifications of a reversal of *Roe v. Wade* on a state-by-state level and not in any manner to endorse or oppose any candidates for public office.

[LOGO] TEXAS

TEXAS AT A GLANCE

EXISTENCE AND STATUS OF ABORTION BAN	STATE CONSTITUTIONAL PROTECTION OF ABORTION RIGHTS	STATUTORY PROTECTION OF ABORTION RIGHTS	OTHER FACTORS
Pre-Roe ban (with exception for woman's life) repealed by implication	Constitutional protecton specifically rejected by court	None	Highly vulnerable to enactment of new ban

RISK FACTORS	HIGH	MEDIUM	LOW

Existence and Status of Abortion Ban: In 2004, Texas's pre-*Roe* abortion ban was held to have been repealed by implication by the numerous subsequent statutes enacted by the legislature regulating abortion.[190] This pre-*Roe* ban was the law that was challenged in *Roe v. Wade* and held unconstitutional by the U.S. Supreme Court.

State Constitutional Protection of Abortion Rights: The Texas Supreme Court has specifically rejected the argument that the Texas Constitution provides broader protection for the right to abortion than the U.S. Constitution.[191]

Statutory Protection of Abortion Rights: None.

Other Factors: Given the current composition of the legislature and the state's history of regulating abortion heavily, it is likely that Texas would enact a new statute banning abortion.

Conclusion: The United States Court of Appeals for the Fifth Circuit held in 2004 that Texas's pre-*Roe* abortion

---

[190] *McCorvey v. Hill*, No. 03-10711 (5th Cir. Sept. 14, 2004). In this action, Norma McCorvey, the original Jane Roe in *Roe v. Wade*, who is now opposed to abortion, sought to reopen the *Roe* case and have the abortion ban declared constitutional. The federal district court rejected her request without reaching the merits on the grounds that too much time has passed since the original judgment was entered. On appeal, the United States Court of Appeals for the Fifth Circuit held that the case was moot because the pre-*Roe* ban had been repealed by implication. *McCorvey v. Hill*, No. 03-10711 (5th Cir. Sept. 14, 2004).

[191] *Bell v. Low-Income Women of Tex.*, 95 S.W.3d 253 (Tex. 2002) (rejecting challenge to state restrictions on Medicaid funding for abortions on basis of state constitutional right to privacy, equal protection, and equal rights amendment).

ban had been repealed by implication. However, the legislature is likely to enact a new abortion ban.

Legislative Session in Texas: Jan. 11 – May 30, 2005
Source: National Conference of State Legislators (NCSL) website
http://www.ncsl.org/programs/legman/about/sess2005.htm

Supreme Court, U.S.
FILED
FEB 9 - 2005
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No 04-967

In The
Supreme Court of the United States
October Term, 2004

Norma McCorvey, fka Jane Roe,
Petitioner,
v.
William "Bill" Hill, Dallas County District Attorney,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF ADMINISTER JUSTICE and THE CENTER FOR LAW AND CULTURE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

Administer Justice is a nonprofit low-income legal service provider and educational organization dedicated to administering justice through a comprehensive program of educational outreach, legal assistance, financial counseling and conflict resolution services. Because of its commitment to the poor and powerless, Administer Justice opposes the disparate impact abortion has on the poor. The complicated issue of poverty and abortion needs to be given voice and be heard by the Court to determine whether to reconsider its opinion in *Roe v. Wade*, 410 U.S. 113 (1973).

The Center for Law and Culture is a national nonprofit organization committed to recovering the traditional Judeo-Christian understanding that law is based on a moral order grounded in God's authority as Creator. The Center conducts research and educational initiatives concerning the nature and sources of fundamental law. The Center's Executive Director, Professor Charles J. Emmerich, co-authored the book, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses*, which has been cited by the United States Supreme Court.

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[1] Counsel of record for the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 37. Pursuant to Rule 37.6, amicus Administer Justice and The Center for Law and Culture disclose that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than amicus curiae.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2004

Norma McCorvey, fka Jane Roe,
Petitioner,
v.
William "Bill" Hill, Dallas County District Attorney,
Respondent.

BRIEF OF
ADMINISTER JUSTICE and
THE CENTER FOR LAW AND CULTURE
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

SUMMARY OF ARGUMENT

More than thirty years have passed since *Roe v. Wade*, 410 U.S. 113 (1973) was decided. In the intervening years significant changes have occurred in medicine and technology that ultimately led this court in *Planned Parenthood of S.E. PA v. Casey*, 505 U.S. 833 (1992) to reject *Roe's* rigid trimester framework. Three Justices in *Casey* implicitly acknowledged the inherent difficulties in *Roe's* "fundamental right" standard and interposed an "undue burden" standard. These modifications cannot correct the underlying fundamental flaw in providing elevated constitutional protection to abortion.

The Court in *Casey* was concerned that *Roe*'s rule could not be repudiated without serious inequity to people who, for two decades of economic development, had made choices relying upon the availability of abortion which had facilitated "the ability of women to participate equally in the economic and social life of the Nation." *Casey, supra,* 505 U.S. at 846. In doing so, the Court failed to examine the true economic statistics which belie such an argument. Even when *Roe* was decided, the Court hoped that this new right afforded women would accomplish such a purpose, but Justice Blackmun's fear that "poverty and racial overtones" would complicate the problem, has proven far more accurate. *Roe, supra,* 410 U.S. at 116.

Statistically, abortion has a catastrophic disparate impact on those living at or below the poverty line in comparison to those of better economic status. This affect upon the poor has similarly and simultaneously affected minorities. As a class, minorities are over represented in abortion statistics and the numbers of abortions among minorities are disproportionate to their numbers among the general population. Amicus Administer Justice is a low-income legal service provider that represents the poor and minorities who have been victimized by the constitutional barrier imposed by the court in *Roe* and subsequent cases. As Mr. Justice White correctly noted in his *Roe* dissent, the court "interpos[ed] a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs." *Roe, supra,* 410 U.S. at 222.

The Court should recognize that the abortion issue is not amenable to a "personal rights" analysis; it is different. The Court should acknowledge this difference and the profound and tragic consequence the decision has had on the very individuals ostensibly sought to be protected - poor and minority women. The very real negative economic impact of abortion should be considered when gauging the respective costs of reaffirming or overruling *Roe* and should tip the balance of justice in favor of overruling.

ARGUMENT

I. THIS CASE AFFORDS THE COURT THE OPPORTUNITY TO REFLECT UPON THE BITTER LEGACY OF ITS RULING IN *ROE v. WADE.*

Mr. Justice Blackmun recognized some of the inherent problems the Court would encounter when legislating liberty in the abortion context. As he observed:

> One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion. In addition, population growth, pollution, *poverty and racial overtones,* tend to complicate and not to simplify the problem.

Roe v. Wade, 410 U.S. at 116 (emphasis supplied).

The lower courts in *Roe* heard no facts and took no evidence to inform this court of the true impact of abortion. Time has yielded statistics that demonstrate the broader implications of the bitter legacy of the *Roe* ruling upon the disadvantaged of this country.

A. The ruling in *Roe v. Wade* has had a disparate impact on the poor and minorities.

The plight of the poor is complex and has engendered much disagreement in this Court in the abortion context.[2] This Court in

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[2] *See Beal v. Doe,* 432 U.S. 438, 456-57 (1977) ("I am appalled at the ethical bankruptcy of those who preach a 'right to life' that means, under present social policies, a bare existence in utter misery for so many poor women and their children." Brennan, J. dissent); *Beal v. Doe,* 432 U.S. at

desiring to administer equal justice to all has not been uniform in how it treats the poor. On the one hand, this Court in *Maher v. Roe*, 432 U.S. 464, 470-71 (1977), stated: "This case involves no discrimination against a suspect class. An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases." On the other hand, this Court has advanced a line of cases which stand for the proposition that if the State chooses to provide a service it "can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin v. Illinois*, 351 U.S. 12, 17 (1956)[3].

The Court recognized in *Griffin* that "a law nondiscriminatory on its face may be grossly discriminatory in operation." *Id.*, 351 U.S. at 17, n. 11. While applied in a legislative context, the

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463 ("There is another world 'out there,' the existence of which the Court, I suspect, either chooses to ignore or fears to recognize. And so the cancer of poverty will continue to grow." Blackman, J. dissent); *See also Harris v. McCrae*, 448 U.S. 297, 316 (1980)(Majority upholds constitutionality of the Hyde Amendment in part on its belief that "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."); *Contrast Harris v. McCrae*, 448 U.S. at 333 "Accurate as this statement may be, it reveals only half the picture. For what the Court fails to appreciate is that it is not simply the woman's indigency that interferes with her freedom of choice, but the combination of her own poverty and the Government's unequal subsidization of abortion and childbirth." Brennan, J. dissenting).

[3] *Griffin* involved the right to a free transcript on appeal in a criminal case. *See also Boddie v. Connecticut*, 401 U.S. 371 (1971) (State's imposition of a fee to obtain a divorce violates due process rights of the indigent); and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996)(State's imposition of a fee for a transcript in civil termination of parental rights hearing violates both the equal protection and substantive due process rights of the poor). There appears to be a distinction without a difference in these cases. Why does an indigent mother have equal protection and substantive due process protection in a procedure to terminate her rights in a child post-birth, but not in a procedure to terminate her rights in a child pre-birth?

argument is no less compelling in the context of the constitutionally created law in *Roe*.

The application of the right to privacy in the abortion arena has been grossly discriminatory in operation. Poorer women are over represented among abortion patients. According to a study of patterns in the socioeconomic characteristics of women obtaining abortions in 2000-2001, 58% of women having abortions in 2000 were poor or low-income (27% below poverty line, 31% with incomes of 100-199% of poverty line), compared with 30% of women in the general population. *see* R.K. Jones, J.E. Darroch, and S.K. Henshaw, *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001*, Perspectives on Sexual and Reproductive Health. Volume 34, Number 5, 231 (September/October 2002). Raw numbers show that disadvantaged women have a much higher rate of abortion per pregnancy than do the rest of the population. In fact, the rate of low-income women is twice as high as that of women with higher economic status, with low-income women aborting 33% of their pregnancies and higher income women aborting 15%. *Id.* Additionally, the rate of abortions among women who receive Medicaid healthcare is three times higher (57 per 1,000) than those who do not receive Medicaid. *Id.*

These statistics, rates, and the negative impact they demonstrate are representative of the impact caused by the *Roe* ruling. The percentage of poor women obtaining abortions since *Roe* reached its peak in 1987, before declining until 1994. From 1994 to 2000, while abortions were in a general state of decline the rate among low-income women actually rose 25%. *Trends in Abortion in the United States, 1973-2000.* The Alan Guttmacher Institute (January 2003).

When comparing the statistics regarding poverty levels from the U.S. Census of 2000 to the rate of abortions per pregnancy, an associated pattern develops. As the percentage of the population living below the poverty line increases so does the rate of abortions per pregnancy.[4] Examples from Illinois where Amicus

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[4] Compare generally, *Data derived from Population Estimates, 2000,*

Administer Justice serves low-income individuals, are Jackson and Kane counties. According to the U.S. Census Bureau based on data derived from the 2000 census, these counties have populations below the poverty line of 25% and 8% respectively. Yet according to the Illinois Department of Public Health the abortion rates for these counties are 20% and 7% respectively. This theme of low-income women comprising a disproportionate percentage of those having an abortion is common throughout the country.

The disproportionate impact of *Roe* on the poor has created a corollary impact on minorities. Between 1994 and 2000 the percentage of hispanic women receiving an abortion was 20% and that of blacks was 32%. Therefore, while these two groups combined make up only 16% of the general population, they obtained more than half, 52%, of all abortions. *Patterns in the Socioeconomic Characteristics of Women obtaining Abortions in 2000-2001, supra, at 232.* The lowest rate of abortions per pregnancy of all races is that of whites which is 13 per 1000, with blacks having a rate three times as high as that and hispanics having a rate two and a half times as high. *Induced Abortion*, The Alan Guttmacher Institute (2003). Time has demonstrated the severity of the disparate impact on minorities and the poor and the Court should recognize this impact in reconsidering its opinion.

B. The ruling in *Roe v. Wade* has further complicated the abortion controversy among the poor and minorities by creating constitutional confusion in the availability of educational information.

This Court has observed that "it is desirable and imperative that [the decision to abort] be made with full knowledge of its nature and consequences." *Planned Parenthood of Central Mo. v.*

U.S. Census Bureau: State and County QuickFacts with *2000 Induced Pregnancy Terminations*, Illinois Department of Public Health, available at http://www.idph.state.il.us/health/abortion/abort00.htm.

Danforth, 428 U.S. 52, 67 (1976). Yet the Court has gone on to create such constitutional confusion that states are left not knowing how they can help their citizens become better informed for fear of crossing a shifting constitutional barrier. On the one hand, members of this Court have argued there ought to be equality of information. *See for example Beal v. Doe,* 432 U.S. at 463: "This is a sad day for those who regard the Constitution as a force that would serve justice evenhandedly and, in so doing, would better the lot of the poorest among us."(Blackmun, J. dissent). Yet when the argument has sought to compel private abortionists to provide equal information, the Court has held such action unconstitutional. *Akron v. Akron Center for Reproductive Health, Inc.*, 426 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986). At the same time, several members of the Court have objected to the government limiting information in the Title X context. *Rust v. Sullivan*, 500 U.S. 173 (1991). This dichotomy can be explained only through the differing applications of the "fundamental right" created in *Roe.*

Amicus Administer Justice has spoken with many women, and has the affidavits of more than a thousand women, who have had abortions because they were uninformed and felt they had no alternatives: Poor women like Mary Doe, who was 22-years-old and living with her indigent parents. Doe was advised that an abortion could be performed on her with less danger to her health than if she gave birth to the child she was carrying and that she would be unable to care for or support the new child in her poverty. *See Doe v. Bolton*, 410 U.S. 179, 185 (1973)[5] As a homeless woman living in a park, the petitioner, Norma McCorvey

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[5] Mary Doe, Sandra Cano, now states in her affidavit: "I neither wanted nor sought an abortion. I was nothing but a symbol in *Doe v. Bolton* with my experience and circumstances discounted and misrepresented... The real experiences of the women must be known and taken into consideration by the court. Abortion is too much what others would like a woman to do, rather than what is in her interest and what she really wants." Para. 2, 22.

fka Jane Roe, was treated the same way. She remarks in her affidavit:

> In a way my exclusion, and the exclusion of real meaningful findings of fact in *Roe v. Wade*, is symbolic of the way the women of the nation and their experiences with abortion have been ignored in a national debate by the abortion industry... Early in my abortion career, it became evident that the 'counselors' and the abortionists were there for only one reason - to sell abortions. The extent of the abortionists' counseling was, 'Do you want an abortion? Ok, you sign here and we give you abortion.' Then he would direct me, 'You go get me another one.' There was nothing more. There was never an explanation of the procedure. No one ever explained to the mother that the child already existed and the life of a human was being terminated. No one ever explained that there were options to abortion, that financial help was available, or that the child was unique and irreplaceable. No one ever explained that there were psychological and physical risks of harm to the mother. There was never time for the mother to reflect or to consult with anyone who could offer her help or an alternative. There was no informed consent... The doctors always hid the truth from the mothers... [6] Aff. Para.16, 20.

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[6] Jane Roe, Norma McCorvey, goes on to recall a specific example: "I remember one woman who came in for an abortion, a pretty, sweet young woman about eighteen years old, with a teddy bear. During the procedure she looked down and saw the baby's hand fall into the doctor's hand. She gasped and passed out. When she awoke and asked about what she saw, I lied to her and told her it didn't happen. But she insisted that she had seen part of her baby. A few weeks later when she returned for her follow-up exam, she was a changed person: her sweetness had died and had been replaced with an indescribable hardness. I could not look her in the eye. It took quite a few beers that night to make that particular day go

The concerns of Mary Doe and Jane Roe are representative of more than 1,000 women filing affidavits in this case.[7] Mr. Justice Stewart
recognized the seriousness of these issues by describing the procedures followed at one abortion clinic:

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away." Aff. Para. 22

[7] Another women called Colleen wrote the following gripping testimony published in the *Post-Abortion Review*, Vol. 1, page 3 (Fall 1993):

"I realized I was pregnant when the smells from chemistry class kept making me sick. A friend convinced me to go to her doctor in town. He diagnosed pregnancy immediately, saying, 'Such a shame, another young one.' He told me not to worry, that "it" could be taken care of.' He never once said anything about keeping the baby, but gave me a card from the local abortuary. Although I had no strong religious convictions, the visit to the clinic for my initial 'consultation' left me feeling bad. The nurse told me to come back in a week with the money to have it done... I was very scared, mostly of the pain they said I might feel. With the counselor, I mostly cried. But she just agreed with everyone I had talked to. Yes, this is a bad time to have a child. Yes, you're too young. Yes, having a child costs lots of money. Yes, it would be hard for you to raise a child on your own. Yes, this is the best thing to do. Waiting to have my name called, I tried to convince myself of these things. I just wanted the whole thing to be over with.

Finally they called me in and put me on a table. The dilation was extremely painful. A counselor held my hand and told me not to cry, it would be over very soon. The suction machine was very loud -- a horrible noise. They had a picture on the ceiling for you to look at so you wouldn't have to think about what was happening to you. The image of that picture is burned into my memory. They took my baby from me while I looked at people walking in the rain.

In the end, the abortion did not 'solve all my problems' as everyone had promised....

I know now the lies I was told, the truths that were withheld from me, the facts that were glossed over or left out. As a pregnant woman, I go to my doctor's office and see pictures of babies in tummies. Month by month, I hear my baby's heartbeat. I'm told how to do everything that's best for my baby's health. Why is it legal across town to NOT tell these things?"

Colleen's question is indeed a constitutional conundrum.

> The counseling... occurs entirely on the day the abortion is to be performed... It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another... The physician has no prior contact with the minor, and on the days that abortions are being performed at the [clinic], the physician... may be performing abortions on many other adults and minors... On busy days patients are scheduled in separate groups, consisting usually of five patients... After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room...

Planned Parenthood of Missouri v. Danforth, 428 U.S. at 91 n. 2 (1976) cited with approval by the majority opinion in *Bellotti v. Baird*, 443 U.S. 622, 641 n. 21 (1979).

The deception and deprivation experienced by these women are not rare isolated cases. Rather, they are typical characteristics of young, economically disadvantaged women seeking an abortion.

Abortion is "big business" and those performing abortions have no incentive to provide complete information because they can hide behind the fundamental right of the mother to have the abortion.[8] Abortion clinics in 2000 provided 93% of all abortions and 65% of these abortions were performed by mass clinics that

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[8] For a devastating critique of the abortion industry, see Bernard N. Nathanson, The Hand of God (1996). In discussing his early career as an abortionist, which entailed directing the world's largest abortion clinic located in New York City, Dr. Nathanson stated: "Mass scale efficient abortion technology had joined hands with the prevailing *zeitgeist* to make possible the assembly-line abortion clinics so desperately needed to free the hospitals to carry on there conventional duties... The New York state law allowing abortions up through the twenty-fourth week of pregnancy would soon be replaced by *Roe v. Wade* which, despite some window dressing about the states' right to restrict abortion in the third trimester, would effectively permit abortion until labor. All that was missing now, in 1970, was the administrative skill to put the mass-scale extermination technology into practice." *Id* at 101.

perform more than 1,000 procedures a year. L.B. Finer and S.K. Henshaw, *Abortion Incidence and Services in the United States,* Perspectives on Sexual and Reproductive Health, 12 (2003). This exploits the poor who do not have the same access to information as a person of greater means. In effect, *Roe v. Wade*, in the name of protecting privacy, has only served to abolish accountability and has handed over the welfare of the poor and uneducated to the abortion industry. The demographic group that suffers most is the poor, not only because they make up 58% of the industry, but because they are taken advantage of most easily.[9] It appears that when the court declared that the abortion procedure was private, it unknowingly also declared abortion education to be private and therefore incomplete.

The latest socioeconomic statistics from the Alan Guttmacher Institute indicate that although abortion rates as a whole have been declining, the rates are decreasing sharply among women with a college education and increasing most among economically disadvantaged women, those covered by Medicaid, and women with less than a high-school education. *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001, supra* at 232.

The victimization of the poor and uneducated is magnified through an analysis of the abortion rate statistics of the twenty-seven states that were successfully implementing "informed consent" laws in the year 2000. M.J. New, *Analyzing the Effects of State Legislation on the Incidence of Abortion During the 1990's.* Center for Data Analysis Report #04-01. The Heritage Foundation (January 21, 2004) available at http://www.heritage.org/Research/Family/ CDA04-01.cfm. The

---

[9] Consider what one former abortionist, Dr. Albert Brown, says:

> [C]linics that cater to the poor are particularly prone to bad conditions, because the poor and minorities are least likely to report problems. [Latino women] are some of the best patients. They come in and they don't complain. Sometimes they are given abortions when they are not even pregnant... It's an unregulated industry.

J. Marquis and L. Romney, *Handful of Abortion Clinics Pit Poor at Risk,* Los Angeles Times (April 5, 1998).

purpose of these laws is to further educate women who would not normally have access to information related to their pregnancy and the abortion procedure. When examining data from the center for Disease Control, informed consent laws have reduced the abortion ratio (number of abortions per 1,000 live births) by 11.69 and the abortion rate (number of abortions per 1,000 women between the ages of 15 and 44) by 0.92. Data from the Alan Gutmacher Institute indicates an even greater effect, reducing the abortion ratio by 22.46 and the abortion rate by 1.57. *Id.* Statistics such as these indicate that women are less likely to have an abortion if simply exposed to unbiased facts on the abortion procedure. The affidavits of the original "Roe" and "Doe" along with over one thousand women filing affidavits in this case, attest to the fact that complete, unbiased information is not readily available.

Without a dramatic overturning of the Court's emphasis on privacy, the plight of the poor and uneducated can only worsen.

II. THE DECISION IN *ROE V. WADE* CONSTRUING ABORTION AS A "FUNDAMENTAL RIGHT" WAS MISGUIDED JUDICIAL LEGISLATION THAT HAS HAD A SIGNIFICANT ADVERSE IMPACT ON ECONOMICALLY DISADVANTAGED WOMEN, AND SHOULD THEREFORE BE OVERTURNED.

A. The Court engaged in judicial legislation when rendering its decision in *Roe v. Wade* to the detriment of economically disadvantaged women.

Justice Iredell in *Calder v. Bull*, 3 U.S. 386, 399 (1798) set forth the long standing role of the Court in reviewing legislative determinations:

> I admit, that as the authority to declare [an act of Congress] void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the legislature of the Union, shall pass a law, within

> the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principals of natural justice.

Under the guise of protecting a women's constitutional right to privacy, this Court embroiled itself in a legislative balancing test of competing interests with an unborn child which time has proven to have been ill-conceived. In two different oral arguments the Court wrestled with the constitutional issue framed as a substantive due process liberty right. Wanting to protect poor women from back alley abortions, this Court fashioned a remedy far broader than necessary. This remedy has proven over time to be a bitter pill with serious repercussions to the very individuals the Court thought it was assisting. As Mr. Justice Rehnquist argued in his *Roe* dissent, "the Court departs from the longstanding admonition that it should not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' (Citation omitted)." *Roe v. Wade,* 410 U.S. at 172.

The Court's decision in *Roe v. Wade*, "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." *Roe*, 410 U.S. at 174 (Rehnquist, J. dissenting).

The decision in *Roe v. Wade* has given rise to a situation where the unintended consequences of the Court's involvement in legislation has created an adverse impact upon a group of people possessing little voice to raise awareness of the injustice of their plight. In his concurring opinion in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 241 (1995), Mr. Justice Thomas warned of the dangers of "unintended consequences" resulting from well-intentioned decisions made on the basis of race. Likewise in *Roe* the Court's crossover into legislation, however well-meant, has had the unintended consequence of limiting the choices of the poor and minorities in this country.

In its subsequent treatment of the *Roe v. Wade* decision, the Court has demonstrated a seeming recognition of an experiment in social legislation gone awry. As Mr. Justice White astutely

observed in 1989, "The key elements of the *Roe* framework – trimesters and viability – are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle." *Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989)(White, J. and Rehnquist, C.J. concurring). Three years later the Court recognized the wisdom of this observation in *Planned Parenthood of S.E. PA v. Casey*, 505 U.S. at 843, stating: "A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers." It appears that the Court has moved away from the fundamental liberty interest standard established in *Roe* and, at the prompting of three Justices, has started to explore the use of an "undue burden" standard instead. *Casey*, *supra*, 505 U.S. at 876-79. Indeed, at least two Justices persisted in arguing *Roe* and *Doe* "were erroneously decided" *Louisiana State Board of Medical Examiners v. Rosen*, 419 U.S. 1098 (1975)(Rehnquist, C.J and White, J. affirming denial of writ).

If the holding in *Roe v. Wade* is sound, why has it required so much tinkering and explanation? The answer is simple: the decision in *Roe v. Wade* is not sound because the Court embarked upon a well-meant, but ultimately misguided, journey into legislation. The Court thus involved itself in a quagmire that no amount of subsequent limiting, explaining, or clarifying could, or will, correct. As Mr. Justice White recognized in the *Webster* decision, "Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine." *Webster, supra,* 492 U.S. at 518. It is time for the *Roe v. Wade* experiment giving rise to a "code of regulations" to come to an end. The Court has sought to address these complicated regulatory issues through the application of *ad hoc* remedies like those adopted in *Webster* and *Casey*. It is time to acknowledge the grievous harm caused by *Roe* and to take the only prudent action -- reconsidering and overturning the decision, so that legislative decision making in this

socially sensitive area can be returned to the people and their elected representatives.

B. The Court's ruling in *Roe v. Wade* that abortion is a "fundamental" right is fundamentally wrong.

Over the history of our great nation, the Court has developed differing levels of scrutiny for legislative acts. In a now famous footnote, Mr. Justice Stone expounded on the Court's role in protecting civil rights by asking "whether prejudice against discrete and insular minorities may be a special condition, which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

To this end, the Court has intervened on behalf of disadvantaged persons at several points in history to protect those persons' constitutional rights. The court has protected ethnic minorities' rights to equal education. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). The court has defended the right of persons to marry without regard to ethnic background. *Loving v. Virginia*, 388 U.S. 1 (1967). The court has defended the rights of indigent persons seeking legal aid to utilize the court system on a basis equal to those of greater means. *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). In all of these cases, the Court successfully and appropriately protected the constitutionally-grounded fundamental rights of "discrete and insular" minorities.

The *Carolene Products* "discrete and insular" rationale, however, can not be defensively applied to the volatile abortion decision because, as Mr. Justice White declared, this decision "must be recognized as *sui generis*, different in kind from the other [rights] that the Court has protected under the rubric of personal or family privacy or autonomy." *Thornburgh v. American College of Obstetricians and* Gyne*cologists*, 476 U.S. 747, 792 (1986) (White, J. Dissenting). Indeed, the Court in *Roe* appeared to acknowledge as much: "The situation [abortion] therefore is inherently different from marital intimacy, or bedroom possession

of obscene material, or marriage, or procreation, or education... ." *Roe v. Wade*, 410 U.S. at 159.

Abortion simply does not fall into the same category as the other rights traditionally protected by the Court. Why is this the case? First, it is becoming increasingly clear that there is little or no textual basis for such an expansive right to privacy in the Constitution. Instead, the *Roe* Court fashioned a constitutional right whole cloth from a penumbra of various rights. Second, the abortion question is a perfect example of the kind of issue that the founders intended for the people and their elected representatives to resolve in a free society. This Court's long and tortuous journey in wrestling with the volatile abortion issue illustrates the pitfalls resulting when the judiciary, without firm constitutional footing, takes on delicate social controversies best reserved for resolution by co-equal branches and the people. Third, and closely related, the abortion question is one that is fundamentally public rather than private and therefore better left for resolution through public debate and dialogue rather than through judicial fiat. Even the majority opinion in *Roe* conceded, "a pregnant woman cannot be isolated in her pregnancy." *Id.*, 410 U.S. at 159.

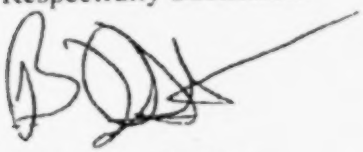
CONCLUSION

The Court's articulated fear that to repudiate *Roe* would result in serious inequity to women is grossly misplaced. The overwhelming and disproportionate number of women affected by abortion are poor and minorities who have been harmed, not helped, by the *Roe* ruling. The voices of the real women affected by *Roe* should be heard and the serious inequity which has resulted should be stopped by reconsidering and repudiating the ruling in *Roe*.

By fashioning an expansive right of privacy not found in the Constitution and then bringing the abortion decision under that rubric, the *Roe* Court unwittingly made itself a legislative body subsequently tasked with promulgating a code of regulations

governing one of American society's most volatile cultural and moral issues. This was not the role of the Court envisioned by the founders; nor is it the role of the judiciary as witnessed in the almost two hundred years of the Court's history preceding *Roe*. The inherent complexity of the issue and the inability of the judiciary to appropriately address this issue counsels a reconsideration and reversal of the *Roe* decision.

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No. 04-967

IN THE

Supreme Court of the United States

NORMA MCCORVEY, formerly known as Jane Doe,
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v.

WILLIAM "BILL" HILL, Dallas County, District Attorney
as successor in office to HENRY WADE,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Supreme Court

---

BRIEF OF *AMICI CURIAE*, ADVOCATES INTERNATIONAL AND ADVOCATES LATIN AMERICA IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici have come to know that this honorable Court is considering granting *certiorari* to Petitioner Norma McCorvey, and they wish to bring to the attention of the Court the following elements from international and domestic law in the Americas.

ARGUMENT

Amici are under the conviction that the Latin American context is analogous and pertinent to be considered in the United States. The countries of Latin America are part of the same hemisphere, and Hispanics make up the largest minority group in the United States. Furthermore, the cultural, educational, commercial and industrial exchanges among the United States and the countries of Latin America are continuously growing. Above all, we share the same humanity and the same commitment to promote a peaceful world, where the life of every person is acknowledged and defended from abuse or violent death.

I. INTERNATIONAL LAW

Amici would like the honorable members of this Court to carefully consider the words of Article 4 (1) of the American Convention on Human Rights (hereinafter "American Convention,") which states:

> **Article 4. Right to Life**
>
> 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

As manifested from the wording of this paragraph, international law in the Americas clearly recognizes the right to life of human beings from the moment of conception. This is one of the provisions of the American Convention that cannot

be suspended under any circumstances, not even under state of emergency, as stated in Article 27:

> **Article 27. Suspension of Guarantees**
>
> The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from *Ex Post Facto* Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or the judicial guarantees essential for the protection of such rights.

The countries that are currently bound by the American Convention are the following: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico[1], Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

Considering the way in which this treaty protects human life from conception, the legislative bodies of all Latin American countries, except for Cuba, have decided not to legalize the practice of abortion.

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[1] Mexico is the **only** State Party to the Convention that has formally reserved Article 4, paragraph 1, declaring unilaterally that "the Government of Mexico considers that the expression 'in general' used in that paragraph does not constitute an obligation to adopt, or keep in force, legislation to protect life 'from the moment of conception,' since this matter falls within the domain reserved to the States." This among several other reservations made by the Government of Mexico was made at the time of ratification of the American Human Rights Convention. Retrieved from http://www.oas.org/juridico/english/Sigs/b-32.html on February 14, 2005.

Nonetheless, much still needs to be done. The problem of abortion does not end with making it illegal. All the nations of the world need to consider the real reasons women contemplate having abortions and respond to their needs in a legitimate way. This would include allowing better access to information about safe contraceptive methods, providing educational and career opportunities, and making adoption a readily available possibility.

Allowing mothers to kill their unborn children harms the mother emotionally, psychologically and physically, and it undermines the basic principle of respect for human life. Women, especially disadvantaged women, need real solutions to problems that do not include allowing them to kill their unborn children. They need to be empowered to decide for themselves the goals for their lives, without having to sacrifice the precious life of an innocent unborn baby.

II. DOMESTIC LAWS

In every country of Latin America, except for Cuba, abortion is forbidden by criminal law. The only exception is when the life of the mother is at risk. This type of abortion is known in Latin America as therapeutic abortion, and it is recognized in many countries.

It is also worth considering that Costa Rica's Constitutional Chamber of the Supreme Court issued a landmark ruling in the year 2000, finding that "the human embryo is a person from the moment of conception ... not an object, (. . .)" so that this life must be protected by the law from conception.[2] This decision is strictly in accordance with international human rights law in the Americas, as well as with domestic law in Costa Rica and many other countries in the region.

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[2] Sentence of the Constitutional Chamber of the Supreme Court of Costa Rica, No. 2000-02306, March 15, 2000.

Several Civil Codes of Latin American countries recognize not only the right to life of the unborn, but also the right to be benefited by all that may be in their favor. Here are just a few examples:

> Titles III and IV of The Civil Code of the Republic of Argentina describe the rights and protection recognized to the unborn. Article 63 states that the fetus conceived in the mother's womb is a person to be born and therefore has rights.[3]
>
> Article 2 of the Civil Code of the Republic of Bolivia declares that the unborn are considered as if they were born for everything that is in their favor.[4]
>
> Similarly, Article 75 of the Civil Code of the Republic of Chile[5] and Article 61 of the Civil Code of the

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[3] First Book of Persons, First Section of Persons in General. Title III. Regarding Not-yet-born Persons. Article 63. Not-yet-born persons are those who, having not yet been born, are conceived in the mother's womb. Civil Code of the Republic of Argentina. Retrieved from http://www.justiniano.com/codigos_juridicos/codigo_civil/libro1_secc1_titulo1al5.htm on February 14, 2005.

[4] First Book. Title I. Regarding Individual Persons. Chapter I. Regarding the beginning and the end of legal capacity. Article 1. Beginning of Legal Capacity. I. Birth designates the beginning of legal capacity. II. For him/her who is to be born he/she is considered born for anything that may favor him/her and being born alive is sufficient to be considered a person. Civil Code of the Republic of Bolivia, in force since April the 2nd, 1976. Retrieved from http://www.cajpe.org.pe/InformacionJuridica01.htm on February 14, 2005.

[5] First Book. Title II. Regarding the Beginning and the End of a Person's Existence. 1. Regarding the beginning of a person's existence. Article 75.—The Law protects the life of him/her who is to be born. Therefore, at the request of any person or *ex officio*, the Judge will take all measures that he/she considers necessary to protect the existence of the unborn, as long as he/she considers it to be endangered. Any punishment to the mother, for which the life or health of the child that she has in her womb could be endangered, will be delayed until the child's birth. Civil

Republic of Ecuador emphatically state that law protects the life of the unborn.[6]

A similar provision has Constitutional authority in the Republic of Peru, where the unborn are considered subjects under the law and, therefore, have rights "for all that is in their favor."[7]

Consistently with this Constitutional provision, the Civil Code of the Republic of Peru states that "the human person is a subject before the law since its birth. Human life begins at the moment of conception. The conceived is a subject before the law in everything that is in its favor. The attribution of patrimonial rights is under the condition of being born alive."[8]

Code of the Republic of Chile. Retrieved from http://www.cajpe.org.pe/Informacion Juridica01.htm on February 14, 2005.

[6] Title II. Regarding the Beginning and the End of a Person's Existence. Article 61.- The Law protects life of he/she who is to be born. Therefore, at the request of any person or *ex officio*, the Judge will take all measures that he/she considers necessary to protect the existence of the unborn, as long as he/she considers it endangered. Codification No. 000. RO/ Sup. 104, November the 20th, 1970.

[7] Article 2.—All persons have the right to: 1. Life, his/her identity, emotional, psychological and physical integrity, and to his/her free development and well-being. The conceived one is a subject under the Law in everything that favors him/her. Constitution of Peru, 1993.

[8] Title I. Beginning of the person. Article 1.—Subject Under the Law. The human being is subject under the Law from the time of his/her birth. Human life begins at conception. The conceived one is subject under the Law in everything that favors him/her. Economic rights are attributed on the condition of being born alive. Civil Code of the Republic of Peru. Legislative Decree No. 295, in force since November the 14th, 1984.

In the same vein, Article 17 of the Venezuelan Civil Code states that fetuses must be considered as if they were born for everything that is for their good.[9]

In Costa Rica, Article 31 of the Civil Code protects the right to life and juridical personality of fetuses since 300 days before their birth.[10]

SUMMARY

In the name of justice and equity, *amici* most respectfully request that this honorable Court grant *certiorari* to Ms. Norma McCorvey. The importance of this is most relevant not only to the United States but beyond its borders, since it will provide a great opportunity to reconsider the new and more compelling facts that are known today and that show that abortion, far from being a private and painless solution to a short term crisis, is actually very shortsighted and harmful to deny the right to life in a most arbitrary way. Abortion is dangerous for women and society as a whole who deserve better than a federally sanctioned abortion regime based on an attenuated constitutional basis. The situations that apparently force women to choose an abortion are much more complex than imagined, and cannot be solved by any quick fix that may be provided by offering mothers the option to abort their children. It is necessary to provide real answers to the needs women have. The long-lasting and painful consequences of abortion on generations of women need to be carefully considered by this Court more than by any other body in any branch of the U.S. government. *Amici curiae* throughout this hemisphere respectfully request the granting of *certiorari* of this momentous case.

---

[9] Section I. Regarding Natural Persons. Article 17. The fetus will be considered born when it is in their favor; and to be considered a person it is sufficient to be born alive. Civil Code of the Republic of Venezuela. Gaceta Nº 2.990, in force since July the 26th, 1982.

[10] Congressional Law Nº 5476, in force since December the 21st, 1973.

CONCLUSION

For all the foregoing reasons, *amici* urge this Court to grant the petition for writ of *certiorari*.

Dated this 18th day of February, 2005.

Respectfully submitted,

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Petitioner,

v.

BILL HILL, Dallas County District Attorney,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* BRENDA ALEXANDER IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae, Brenda Alexander, is an individual whose mother attempted to abort her through chemical means. The abortion failed to end the life of Brenda Alexander, but as a result, Brenda Alexander, suffered emotional hurt, and the relationship with her mother was strained. Since discovering the events before her birth, Brenda Alexander is dedicated to ending abortion and promoting respect for all human life. Brenda Alexander submits this brief in support of Norma McCorvey, formerly known as Jane Roe.

SUMMARY OF ARGUMENT

Since the decision by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973) to extend the right of privacy to a woman's decision to terminate a pregnancy, a number of factual and legal developments have occurred that would make the continued application of that decision inequitable. Over the course of the last thirty-two (32) years, the harm done to women, men, families and society has mounted, yet the states have been effectively denied the ability to exercise their power in protecting the health and welfare of their residents. This is largely due to the *Roe v. Wade* decision and those decisions coming thereafter that have kept the states from acting in the best interests of their citizens. The concurring opinion of Judge Edith H. Jones in *McCorvey v. Hill*, No. 03-10711, *slip op.*, at 11-12 (5th Cir. Sep. 14, 2004) sets forth this state of affairs:

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

> "In sum, if courts were to delve into the facts underlying Roe's balancing scheme with present-day knowledge, they might conclude that the woman's 'choice' is far more risky and less beneficial. . . .
>
> "At the same time, because the Court's rulings have rendered basic abortion policy beyond the power of our legislative bodies, the arms of representative government may not meaningfully debate McCorvey's evidence. The perverse result of the Court's having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter. . . .
>
> "One may fervently hope that the court will someday acknowledge such developments and re-evaluate Roe and Casey accordingly. . . ."

While the law continues to evolve in such a way as to increasingly expand the responsibilities and powers of the states in caring for the health of their citizens, for the reasons set forth by Judge Jones above, they are prohibited from doing so. There are more than 5,000 pages documenting the harm, physical, emotional, and psychological, to women, and by implication, those around them, brought by abortion. Expert opinions from health care professionals clearly indicate the link between abortion and a number of maladies that affect women immediately after an abortion and throughout their lives.

The ramification of this situation is that the states are unable to adequately protect their citizens by legislation after being allowed a healthy discussion of the medical, psychological, emotional, and familial harm of abortion. This can only serve to negatively impact the public health requiring greater expenditures of public and private funds at a time when states and private firms are under severe

fiscal strain largely due to the rising health care costs and increased demands for health care services. With the number of abortions exceeding one million per year, the impact of abortion on public health is substantial. The Court should address the compelling issues raised by the writ of certiorari as they are of great national importance.

ARGUMENT

This case provides the Court with an opportunity to review a social policy that has serious, and long-lasting, negative effects on women and hence society at large. The issues raised by the motion filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure present themselves at a critical time, and these issues certainly are not moot. The amount of evidence that has accumulated, and continues to accumulate, as to the deleterious nature of abortion is astounding and worthy of serious review, yet there has been no forum for addressing the policy implications. Federal jurisprudence has undergone major changes since the decision in *Roe v. Wade* was handed down. The power and authority of the States in caring for their citizens has been given a greater recognition by the United States Supreme Court over the course of the last thirty-two years since the *Roe v. Wade* decision. This brief focuses on some of the substantive issues that the lower courts did not reach by virtue of their erroneous decisions not to hear the matter. The Court should grant the petition for a writ of certiorari.

I. COMPELLING REASONS EXIST FOR THE EXERCISE OF JUDICIAL DISCRETION IN GRANTING THE PETITION FOR WRIT OF CERTIORARI

Rule 10 of the Rules of Court of the Supreme Court of the United States sets the standard for granting writs of

certiorari: "A petition for writ of certiorari will be granted only for compelling reasons." Among those compelling reasons is included a decision by a "United States court of appeal . . . [of] . . . an important question of federal law . . . or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c).

The cases examined by the Court are not to be hypothetical, rhetorical, or academic exercises. In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614 (1955), this Court explains that it squarely faces issues of a constitutional nature to "reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. . . ." Cases accepted on writs of certiorari are those " . . . 'involving principles the settlement of which is of importance to the public, as distinguished from that of the parties. . . .'" *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, at 501, 71 S.Ct. 453 (1951).

The *Rice* case involved an action for damages concerning a private cemetery's refusal to permit burial of a non-Caucasian. The *National Labor Relations Board* case involved alleged unfair labor charges. Both cases met the standards for granting a writ of certiorari because of the actual or projected impact on many people. The *Roe* Petition is no different. More than forty-five million abortions have been had since the legalization of abortion, and at the rate of more than one million per year, many more men, women, and children will be effected. If one were to consider that each conception involves a woman, a man, and the child, then with forty-five million abortions one could conclude more than one hundred thirty-five

million human beings have been directly involved with abortion since state restrictions were lifted. At the rate of one million abortions per year, at least three million more human beings are involved annually. Up to one quarter of all pregnancies end in abortion[2] and abortion has become the most common medical procedure performed on women.

The impact on so many is an impact on society at large, and on the States in particular. With the evolving notions of federalism that have been occurring in this Court's jurisprudence since the mid 1970s, almost immediately after the *Roe* decision was handed down, constitutional questions have arisen as to the extent and nature of the Court's discerned right to privacy in the area of abortion. The resolution of these constitutional questions are of a compelling, and very real, importance to the public, the states, and the nation as a whole since abortion has become such a frequent procedure.

II. THE RULE 60(b) MOTION BY PETITIONER IS NEITHER MOOT NOR UNTIMELY

A. The Doctrine of Mootness Is Inapplicable to the Instant Case Since the Issues Giving Rise to the Case Have Not Disappeared and Any Court Decision Will Have A Practical Effect

"A case is moot if the issues that gave rise to it have been resolved or have otherwise disappeared. Such a case is apt to be dismissed because a court decision would have

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[2] *See The World Almanac and Book of Facts* 2004 pp. 73, 77.

no practical effect."[3] Some view the use of the mootness doctrine as a "convenient 'out'."[4]

The issues that gave rise to *Roe v. Wade* remain. Women are still becoming pregnant and are considering their options. These issues have taken on new significance with the changes in the judicial view of federalism since the decision was rendered. As the increasingly obvious deleterious effects of abortion continue to accrue and as a high rate of abortions continue, a court decision will have enormous practical effect. Denying the Petition, and the Rule 60(b) motions, keeps a critical discussion of women's health in the dark. Granting the Petition and the Rule 60(b) motions allows for a discussion, and the development of policy, to avert any more continued harm to women's health and society's overall well-being.

Now is an important time to face the issues presented by the Petition since matters of public health, health costs, and declining social welfare systems ultimately affecting all citizens are implicated. The decision will affect things such as how women lead their lives, public health, the ability of the states to protect the health of their citizens, and the overall condition of the social systems in the United States.

B. Circumstances Make Timely The Motion Brought Under Rule 60(b)

Rule 60(b) of the Federal Rules of Civil Procedure allow for earlier decisions to be changed when "(5) . . . it is no longer equitable that the judgment should have prospective

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[3] *See* Otis H. Stephens, Jr. and John M. Scheb II, *American Constitutional Law* at 24 (3rd ed. 2003).

[4] *See* Otis H. Stephens, Jr. and John M. Scheb II, *American Constitutional Law* at 25 (3rd ed. 2003).

application; or (6) any other reason justifying relief from the operation of the judgment." The Rule states that a motion under sections (b)(5) and (b)(6) must be made "within a reasonable time". "'What constitutes reasonable time must of necessity depend upon the facts in each individual case.' The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner. . . . In some of the . . . cases the court merely states the time interval involved and says that it was unreasonable but undoubtedly the court forms this judgment in the light of the circumstances of the particular case."[5] Indeed, there is no time limit particularly when it comes to Rule 60(b)(6). *Strama v. Peterson*, 96 F.R.D. 198, 199 (D.C. Ill. 1982) (*citing Wright and Miller* Section 2866).

In the instant case, the District Attorney for Dallas County, Texas has not filed any opposition to the Rule 60 Motion filed by Norma McCorvey. Indeed, he has no opposition to the Petition for Writ of Certiorari. These are not the actions of a party that has been prejudiced or stands to suffer prejudice by any delay from the Petitioner.

Petitioner explains the circumstances as to why she did not file the Rule 60 motion sooner than 2003, and these circumstances are intimately tied up with how the case came to be. Norma McCorvey was an uneducated woman living on the streets (*Norma McCorvey Affidavit,* Para. 8); she did not understand just what abortion meant (*Norma McCorvey Affidavit*, Paras. 9 and 12); and she was "drunk or stoned" for a very long time after the decision (*Norma McCorvey Affidavit,* Para. 26).

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[5] *See, Wright and Miller* Section 2866.

These circumstances also include what amounts to manipulations by the lawyers of the Petitioner more than thirty years ago. This manipulation included repeatedly telling her that an unborn child was "only tissue" (*Norma McCorvey Affidavit*, Paras. 9, 14); never explaining what abortion involved (*Norma McCorvey Affidavit*, Paras. 12, 14); allowing Petitioner to sign an affidavit without explanation, without understanding, and without even reading it (*Norma McCorvey Affidavit*, Para. 13); and only speaking with her two times – to sign the affidavit, and to discuss the case over "pitchers" of beer before agreeing to be the plaintiff (*Norma McCorvey Affidavit*, Paras. 8, 13).

After years of working in abortion facilities, Norma McCorvey accepted "what abortion really is: . . . a violent act which kills human beings and destroys the peace and the real interests of the mothers involved." (*Norma McCorvey Affidavit,* Para. 26) She had spent years observing that women are not given information on the procedure, that women were not told of the options, that no one explained the psychological and physical ramifications of abortion, there was no time for the mother to reflect, and there was no informed consent. (*Norma McCorvey Affidavit*, Para. 22) She witnessed the unsanitary condition of these facilities (*Norma McCorvey Affidavit*, Para. 20), and the uncaring actions of unqualified abortionists who risked the lives of the women by their actions (*Norma McCorvey Affidavit*, Para. 21). All of these observations, submitted under oath, stand in striking contrast to the findings of this Court in *Roe v. Wade* that abortion is a benign, safe procedure. A great injustice has been done to the women of America, and this injustice threatens to be allowed to continue unless it is addressed in this Petition.

The issues of fact and law (as discussed more fully below) are simply of so compelling a nature that the "out" of mootness should not be employed. Ironically, before *Roe*

v. Wade, policy discussions could be carried on more openly and honestly than today. It is time to address the uncontroverted evidence of the negative impact of abortion so as to prevent the continuation of injustice.

III. PETITIONER'S MOTION PURSUANT TO RULE 60(b)(5) AND 60(b)(6) PRESENTS MORE THAN SIGNIFICANT CHANGES IN BOTH FACTUAL CONDITIONS AND THE LAW

A. The Conditions Under Rule 60(b)(5) Have Been Met

Petitioner successfully established the basis for a motion under Rule 60(b)(5) motion and the District Court erred also in not granting the motion. Those requirements were set forth by this Court in *Agostini v. Felton,* 521 U.S. 203, at 215, 117 S.Ct. (1997):

> "In *Rufo v. Inmates of Suffolk County Jail, supra,* at 384, 112 S.Ct. at 760, we held that it is appropriate to grant a rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show a 'significant change either in factual conditions or in law.' A court may recognize subsequent changes in either statutory or decisional law. . . . 'The court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong.'"

Changes in the factual circumstances must not have been anticipated at the time of the original decision. This Court went on to say in *Agostini*, a case involving increased school costs, that "[P]redictions of additional costs turn[ing] out to be accurate does not constitute a change in factual conditions warranting relief under Rule 60(b)(5). . . . 'Ordinarily . . . modification should not be

granted where a party relies upon events that actually were anticipated at the time [the order was entered]' . . ." *Id.* at 216-217.

It is clear from a reading of *Roe v. Wade,* that there is no anticipation of harmful physical effects on women, men, or society. Indeed, there is no discussion other than that abortion, as a medical procedure, may be safer than childbirth. The Court concluded that carrying a child to term and that childbirth may cause greater harm to a woman than abortion:

> "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation." *Id.*, at 153.

The Court focused on how the abortion procedure was safer than birth:

> "Modern medical techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early

> abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth." *Id.*, at 149.

The Court did not discuss, nor did it anticipate, any long-term physical and emotional effects of abortion nor did it ever anticipate that childbirth may become safer. Indeed, there is no indication of any negative ramifications of abortion to either aborting women or society at large. The research since the Court's holding in *Roe v. Wade* clearly shows that abortion poses long term health and psychological harm and that it has become more dangerous than childbirth.

Death rates associated with abortion are higher than those mortality rates associated with childbirth. (*Affidavit of David C. Reardon,* p. 7.) Women who have had abortions experience significant negative psychological sequelae. (*Affidavit of David C. Reardon,* p. 42.) Women are generally not offered adequate screening for risk factors thereby making more likely that abortion will cause psychological trauma. (*Affidavit of David C. Reardon,* p. 53.) "There is no statistically validated medical evidence that abortion is ever more likely to be beneficial to any group" of women under any circumstance. (*Affidavit of David C. Reardon,* p. 89.) Childbirth is more beneficial than abortion in at least the following areas: reducing the risk of breast cancer, cervical cancer, ovarian cancer, liver cancer, endrometrial cancer, and colon and rectal cancer. (*Affidavit of David C. Reardon,* p. 96.) Women who undergo childbirth have lower rates of depression than do women who abort, and women who abort have higher rates of clinical depression, smoking, and substance abuse. (*Affidavit of David C. Reardon,* p. 96.)

B. Sufficient Grounds Exist for the Application of Rule 60(b)(6)

Rule 60(b)(6) provides for relief from a judgment or decision to prevent manifest injustice. It is an equitable remedy that relies on the Court's equitable powers. This Court held in *Klapprott v. United States*, 355 U.S. 601, at 614-615, 69 S.Ct. 384 (1949). *Klapprott v. United States*, decided near the inception of Rule 60(b)(6), involved the loss of citizenship by an individual. In finding this loss as a circumstance that justified relief under Rule 60(b)(6), this Court held "It may result also in loss of both property and life, or of all that makes life worth living." *Id.* at 612.

"In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989). "A change in relevant case law by the United States Supreme Court warrants relief under Fed.R.Civ.P.60(b)(6)." *Id.* In *United States v. McDonald*, 86 F.R.D. 204, 208 (D.C. Ill. 1980), the District Court emphasized the importance of liberally allowing Rule 60(b)(6) motions:

> "Moreover, once extraordinary circumstances or hardship is found, Rule 60(b)(6) is to be liberally applied to 'accomplish justice.' 7 Moore's Federal Practice P. 60.27(2), pp. 352 et seq."

It is not difficult to see that the harm caused by abortion (depression, breast cancer, cervical cancer, substance abuse, etc.) stands to rob so many unsuspecting of "all that makes life worth living." The relief available under Rule 60(b)(6) should be made available to the Petitioner.

IV. CHANGES IN FEDERAL JURISPRUDENCE HAVE CHANGED THE LEGAL BASIS OF *ROE V. WADE*

The Tenth Amendment to the United States Constitution reserves powers to the States, and is an essential component of Federalism in the United States: "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

"Inherent police power belongs to the states." *XO Missouri v. City of Maryland Heights*, 362 F.3d 1023 (8th Cir. 2004). The Court has a long history of recognizing the existence of state police powers. In *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98 (1954) the Court opined that

> "Public safety, public health, morality, peace and quiet, law and order – these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."

"The exercise of the policy [sic] power for the general welfare of the public is a right reserved to the states by the Tenth Amendment to the Constitution." *Brown v. Brannon*, 399 F. Supp. 133, 147 (M.D.N.C. 1975). "Each state has an interest in protecting the health and the physical and mental well-being of her citizens. . . . A state legislature pursuant to its police power has the right to enact legislation which attempts to improve and protect the health and well-being of her citizens." *Kleid v. Board of Education*, 406 F.Supp. 902, 905 (W.D. Ky. 1976).

Since the 1970s, the relationship between the States and Federal government has undergone a revision. "[T]he Tenth Amendment reserves to states all powers not specifically granted to the national government or prohibited

to the states. It has been resurrected from its earlier obscurity to serve as the legal basis for striking down federal laws that the Court majority believes interfere with powers reserved to the states."[6] There has occurred what has been termed a "devolution revolution" in which many functions have been returned to states.[7]

In what scholars have termed the "new federalism", judicial decisions since the mid 1970s have increasingly recognized the sovereignty, and importance, of the states that comprise this indissoluble union. *Texas v. White*, 74 U.S. 700, 19 L.Ed. 227 (1868). The principles contained in the Tenth Amendment of the United States Constitution have gained new and different life by a progeny of cases over the course of the last thirty years. These profound philosophical and judicial changes have occurred during the time after the *Roe v. Wade* decision was handed down and constitute such a change as to profoundly effect the prospective application of *Roe v. Wade*.

The importance of the States in the Federalist system is increasing. This enhanced stature is described by this Court in *Printz v. United States*, 521 U.S. 898, at 919, 117 S.Ct. 2365, 138 L.Ed. 2d 914 (1997):

> "It is incontestible that the Constitution established a system of 'dual sovereignty.' *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 2399, 115 L.Ed.2d 410 (1991); *Tafflin v. Levitt*, 493 U.S.

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[6] *See,* David C. Saffell and Harry Basehart *State and Local Government: Politics and Public Policies* (7th ed. 2001) p. 48 *citing to* Matthew D. Alder and Seth F. Kreimer, "The New Etiquette of Federalism: New York, Prince, and Yesky," in *1998 Supreme Court Review* (Chicago: University of Chicago Press, 1999), p. 71.

[7] *See,* James MacGregor Burns, J. W. Peltason, Thomas E. Cronin, David B. Magleby, David M. O'Brien, Paul C. Light, *Government by the People* (20th ed. 2004) p. 61, *citing* "The Devolution Revolution" Daniel Patrick Moynihan, *New York Times*, August 6, 1995, p. B15.

> 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990). Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty,' The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text. . . . including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights," *Helvering v. Gerhardt,* 304 U.S. 405, 414-415, 58 S.Ct. 969, 973, 82 L.Ed. 1427 (1938). Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'"

The rights and powers of states to address medical and mental health issues are given the widest latitude. This Court noted in Footnote 3 of *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997) that:

> "We recognize, of course, that psychiatric professionals are not in complete harmony in casting

> pedophilia, or paraphilias in general, as "mental illnesses." Compare Brief for American Psychiatric Association as *Amicus Curiae* 26 with Brief for Menninger Foundation et al. as *Amici Curiae* 22-25. These disagreements, however, do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes. Cf. *Jones v. United States*, 463 U.S. 354, 365, n. 13, 103 S.Ct. 3043, 3050, n. 13, 77 L.Ed.2d 694 (1983). As we have explained regarding congressional enactments, when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.'"

Additionally, liberties protected under the Due Process Clause of the Fourteenth Amendment may be subject to restriction by the State in the exercise of its power to protect the public health and to enhance the general welfare. "[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded." *Id.* at 363.

In a dissenting opinion in *Stenberg v. Carhart,* 530 U.S. 914, 970 (2000), it was recognized that there is "substantial authority allowing the State to take sides in a medical debate, even when fundamental liberty interests are at stake." (J. Kennedy, dissenting.) The power and interests of the states have also been increased particularly in the protection and preservation of human life. Again, the dissent in *Stenberg v. Carhart*, at 957, noted that "The political processes of the state are not to be

foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential. [*Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 871 (1992)]" (joint opinion of O'Connor, Kennedy, and Souter, JJ). The State's constitutional authority is a vital means for citizens to address these grave and serious issues, and they must if we are to progress in knowledge and understanding and in the attainment of some degree of consensus. . . ." (J. Kennedy, dissenting.)

This Court found in *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 282 (1990) that "a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." And, States have an interest in "protecting vulnerable groups – including the poor, the elderly, and disabled persons – from abuse, neglect, and mistakes." *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997).

V. THE FACTUAL FOUNDATION OF *ROE V. WADE* IS UNDERMINED AND TO ALLOW ITS CONTINUED PROSPECTIVE APPLICATION IS UNJUST

A fundamental tenet of the Court's decision in *Roe v. Wade* was the necessity of preserving the health of the mother. The Court recognized the interest the State of Texas had in preserving that health:

> "We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and that it has still another

> important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'
>
> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 725, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id.*, 162-163.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), this Court did not have the facts necessary to challenge the decision in *Roe v. Wade*:

> "Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973." *Id.*, 860.

However, *Planned Parenthood of Southeastern Pa. v. Casey* recognized that *Roe v. Wade* could be changed, if not overturned, were its factual foundations challenged.

Woman after woman provided affidavits that answered three questions: "How has your abortion affected you?", "Based on your own experiences, what would you

tell a woman considering an abortion?", and "Based on your own experience, what would you tell a court that believes abortion should be legal?" The answers from all of these women were that abortion caused psychological, physical, and/or relational difficulties. Not a one recommended abortion, and they all asked the court to at least know the truth of what abortion does to women. The instant case presents a challenge to these foundations. With over 5,300 pages of testimony from nearly one thousand women who had abortions, along with the expert opinions of two health care professionals, *Roe v. Wade* is seriously challenged. The uncontroverted evidence provided by the Petitioner shows in detail the physical, emotional, and psychological harm done to the women who have undergone abortions.

Planned Parenthood of Southeast Pa. v. Casey made clear that abortion affects those other than the woman having the abortion. Abortion affects the spouse, family, and society at large. *Id.* at 852.

"Elective abortion is an important cause of child abuse. . . . Recent evidence indicates many women harbour strong guilt feelings long after their abortions. Guilt is one important cause of child battering and infanticide. Abortion lowers women's self-esteem and there are studies reporting a major loss of self-esteem in battering parents. . . ."[8] Evidence shows that psychological trauma occurs in those other than the woman electing abortion. Some of these groups are: children who have had either a brother or sister, or both, who were aborted; children with developmental disabilities or handicaps; "children who

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[8] *See* P. Ney, M.D. *Relationship Between Abortion and Child Abuse* Canada Journal of Psychiatry, vol. 24, pp. 610-620.

survived deliberate attempts to terminate their lives by saline, suction curettage or hysterotomy".[9]

Abortion destroys interpersonal relationships, whether these be marriages or not.[10] Men are negatively affected and in turn they engage in behavior that is destructive to themselves and society at large.[11] The impact to society has gone well beyond what was anticipated by the *Roe v. Wade* court.

CONCLUSION

For the foregoing reasons, the reasons contained in the petition and for those reasons discussed by other *amicus curiae,* the petition for a writ of certiorari should be granted.

Respectfully submitted,

February 8, 2005

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[9] *See* Philip G. Ney, *Emotional and Physical Effects of Pregnancy Loss on the Woman and Her Family: A Multi-Centered Study of Post-Abortion Syndrome and Post-Abortion Survivor Syndrome*, Post-Abortion Aftermath (Sheed & Ward 1994) Michael T. Manion, editor; p. 74.

[10] *See,* Vincent M. Rue, *The Psychological Realities of Induced Abortion*, Post-Abortion Aftermath (Sheed & Ward 1994) Michael T. Manion, editor; p. 26; Theresa Burke and David C. Reardon, *Forbidden Grief* (Acorn Books 2002) pp. 201-220.

[11] *See,* Thomas Strahan, *Portraits of Post-Abortive Fathers Devastated by the Abortion Experience*, Association for Interdisciplinary Research in Values and Social Change Nov/Dec 1994, pp. 2-3; David C. Reardon, *Forgotten Fathers and Their Unforgettable Children* The Post Abortion Review 4(4) Fall 1996.

(15)

CASE 04-967

In The Supreme Court Of The United States

NORMA McCORVEY,
FORMERLY KNOWN AS JANE ROE,

Petitioner

Vs.

BILL HILL, Dallas County District Attorney,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Brief of American Life League and Yvonne Moore, M.D. AMICI CURIÆ FOR PETITIONER

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THE QUESTION PRESENTED FOR REVIEW

Whether the Court should hear the petition for writ of certiorari by Norma McCorvey, the Jane Roe of the *Roe v. Wade* case 410 U.S. 113 (1973)?

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A WOMAN'S RIGHT TO KNOW © 2003, Texas Department of Health, http://www.dshs.state.tx.us/wrtk/pdf/booklet.pdf 7, 9

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BRIEF OF *AMICII CURIAE*

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicii have a substantial interest in the disposition of this case. Amicus American Life League is an educational organization dedicated to raising public awareness re the facts about abortion. All other Amicii are physicians who formerly performed abortions or formerly talked to women and then referred them for abortions or both. In 1973 and for a time afterwards, they supported the *Roe v. Wade* 410 U.S. 113 (1973) decision and were abortion providers. As conditions and relevant facts changed over time, however, they realized that the factual basis for *Roe v. Wade* either was originally flawed or had become flawed by changes which took place after 1973. If the Court accepts the present petition, they will present to the Court certain changes relevant to abortion providers which changes have destroyed the factual foundation as perceived in 1973 for the original *Roe v Wade* decision 410 U.S. 113 (1973).

Pursuant to Supreme Court Rule 37.6 Amici state that the brief was prepared in its entirety by Amici curiae and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amicii curiae*, their members, and their counsel.

SUMMARY OF REASONS FOR GRANTING CERTIORARI

1 In the original *Roe v. Wade* 410 US 113 (1973), hereafter referred to as Roe v Wade, an underlying, implied, unstated reason for waiving mootness and considering the case not moot even though the pregnancy had terminated before the case was argued

or decided, was that the questions presented were of great public importance, especially to pregnant women. Abortion is still a matter of great enough public importance, especially to pregnant women who may be injured if they abort, to overcome allegations of mootness relied on by the lower court.

2 In early 1967, abortion was illegal at all times of pregnancy in every US jurisdiction in nearly every possible situation and in nearly every country. Accordingly, because of the short time between legalization and the filing of the original *Roe v. Wade* case, there had been no opportunity before *Roe v. Wade* was decided to adequately study the consequences of legal abortion. Even if there had been sufficient time, the procedure used to decide the facts did not permit cross examination or other development of facts in the lower court which would have given this Court a better factual foundation.

3 An unending avalanche of scientific progress and new knowledge not considered by the *Roe v. Wade* decision illustrates that abortion causes so many problems that physicians increasingly abandon or refuse to take up the practice of abortion. The same reasons indicate that *Roe v. Wade* 410 U.S. 113 (1973) should be reconsidered. Performing abortions was and is lucrative. Thousands of physicians flocked to this lucrative new medical practice. However, to their surprise, most of these physicians learned that abortion was far from the idyllic procedure suggested by proponents to this and other courts. Facts not considered by this Court in the *Roe v. Wade* decision illustrate reasons why the present petition should be granted, why providing abortion is being abandoned by large numbers who have provided abortion, and why providing abortions has been shunned by nearly all new physicians

4 In 1973, this Court stated that early abortion was safer than continuation of the pregnancy to childbirth.

Safer, as used by the Court, meant based on selected limited data then available, abortion was less likely than pregnancy to immediately kill the woman. Experience since 1973 indicates that considering longer periods after the procedures reverses the conclusion of the Court in *Roe v. Wade* 410 U.S. 113 .

5 When the *Roe v. Wade* opinion was announced, pro-choice women rejoiced, while pro-life women asked: "Has killing lost its horror?" Subsequently, the pro-choice women had more than a million annual abortions comprising about half their pregnancies, while the pro-life women usually cherished their pregnancies, whether wanted or not, and gave birth about twice as frequently as the pro-choice women. Abortion causes demographic changes which lower fertility sufficiently to diminish and partially destroy populations which advocate abortion. As the abortion advocating population relatively diminishes, relative opposition to abortion increases so that legal abortion contains the seeds of its own political demise. These demographic changes are causing abortion to become less popular in the US so that the *Roe v. Wade* decision will be overruled, either by this court or relatively soon by Amendment or legislation.

6 *Roe v. Wade* contributes to the defeat of many pro-choice politicians. Part of the reason why pro-choice politicians are finding it increasingly difficult to get elected is that ubstantial numbers of people believe that the *Roe v. Wade* decision was unjust and not sufficiently supported by foundational facts or law. These same public perceptions are so widely believed that they are distorting US politics. Accordingly, they are a strong reason for this Court to reconsider *Roe v Wade.*

REASONS FOR GRANTING CERITORARI

I.

PUBLIC IMPORTANCE IS AN IMPORTANT REASON FOR WAIVING MOOTNESS

In the *Roe v. Wade*, 410 U.S. 113 (1973) decision this Court held that mootness should not apply because the present petitioner, then aka Jane Roe, had standing to undertake the *Roe v. Wade* litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy had not rendered her case moot. The *Roe v. Wade* decision prevented the enforcement of the pre-existing abortion laws of all fifty states.

Some states have since passed legislation which was limited to what they felt could pass Constitutional muster in view of *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. Under these circumstances, and because of the importance of the *Roe v. Wade* decision, this Court should permit the present petition to be heard because the technical arguments to reject the present petition are not substantially stronger than the arguments for mootness that were rejected in 1973, and the public importance of the abortion issue, particularly to pregnant women who may be injured if they abort, has not diminished since 1973.

It cannot be shown that amendments since 1973 to the prior Texas law resulted from a desire to repeal the law and make abortion on demand legal. It is reasonable to assume the purpose of the amendments was not to repeal the abortion law found unconstitutional by *Roe v Wade*, but rather from a desire to come to terms with what would be permitted by this Court in view of its *Roe v. Wade* decision. Rejecting this petition because of a technicality of mootness that was waived in order to hear the original *Roe v. Wade* petition would also increase the disdain

with which many millions of Americans view this Court because of the *Roe v. Wade* decision.

II.

THERE WAS NOT ENOUGH TIME BEFORE 1973 TO DETERMINE RELEVANT ABORTION RELATED FACTS FOUNDATIONAL TO THE *ROE V. WADE* DECISION

In early 1967, abortion was illegal at all times of pregnancy in every US jurisdiction in nearly every possible situation as well as in nearly every other country. In 1967, legislation passed making abortion legal for limited circumstances for limited times in the United Kingdom and in two states making abortion legal in those states at the beginning of 1968. Initially in 1968, there could be no record on which to judge the effect of legal abortion because abortion had been illegal.

Because abortion was illegal until 1968, the lower courts and this Court in making the *Roe v. Wade* decision lacked sufficient facts relating to the effect of legal abortion on which to base their opinions. The foundational factual basis largely comprised partisan opinions enshrined into arguments.

This Court, in the *Roe v. Wade* decision, compared the safety and danger of abortion to childbirth by comparing the death rates from abortion immediately after the abortion to the much longer period related to pregnancy. The *Roe v. Wade* opinion suggests that this Court did not know when *Roe v. Wade* was decided that the danger from abortion continues beyond the time the Court stopped considering abortion caused deaths and comparing the chance of such deaths to the chance of deaths related to pregnancy.

When *Roe v. Wade* was argued there was insufficient background re legal abortion permitting study of problems relating to women who had had

abortions because insufficient time had elapsed for problems to arise and be studied. For example, emotional trauma can follow abortion, but the woman's initial response is frequently relief that the problem pregnancy is gone. The trauma frequently arises later, and some times causes suicide. Physical problems also are likely to arise later, rather than immediately.

III.

SCIENTIFIC PROGRESS AND NEW KNOWLEDGE NOT CONSIDERED BY THE *ROE V. WADE* DECISION ILLUSTRATE NEW FACTS AND PROBLEMS THAT SUGGEST RECONSIDERATION

Performing abortions was and is lucrative, permitting physicians to earn more than $1,000.00 per hour. In addition to being lucrative, performing early abortions is relatively simple compared to many other types of medical practice. In 1973, the down side to performing abortions was not yet known. Accordingly, thousands of physicians flocked to this lucrative new medical practice. In physicians' offices for 6-week abortions, the least expensive type of abortion, the mean charge has been about $600.00 and the median charge has been about $500.00.[1]

Most of the physicians who began performing abortions after legalization learned that abortion was far from the idyllic procedure suggested by proponents in arguments to this and other courts. As time went on, new research led to new knowledge about pre-born babies and the effect of abortion on women and on society. This new knowledge has caused every excuse for legalized abortion on demand to attenuate or dissipate. It has caused former providers to abandon abortion practice and nearly all new physicians to avoid abortion.

The number of physicians' offices, clinics and hospitals where abortions are performed in the United States has been declining since 1982. The number of abortion providers has recently continually declined so that 87% of US counties have no abortion provider.[1]

Respondent's State of Texas Government summarizes some of this new knowledge and a few of these problems in the booklet "A woman's right to know"[2]

Texas' booklet states in part:

> "Introduction
>
> "You are reading this booklet, 'A Woman's Right to Know' because you are thinking about having an abortion.
>
> "Texas law says your doctor must talk to you about certain things before you can have an abortion.
>
> "Some of the things your doctor must talk to you about include...Characteristics of the unborn child...The medical risk of having an abortion..."

The booklet first describes with photos the pre-born embryo and fetus. It then describes the most important types of abortions and lists for each type of abortion "Possible side effects and risks". More than 90% of the side effects and risks for each type of abortion are not considered in Roe v Wade.

The booklet then lists six reasons why the woman should go to the emergency room. None of these reasons are considered in the *Roe v. Wade* decision.

The booklet then considers "Emotional side of an abortion" as follows:

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[1] THE ACCESSIBILITY OF ABORTION SERVICES IN THE UNITED STATES, 2001, Henshaw and. Finer (Alan Guttmacher Institute) http://www.agi-usa.org/pubs/fb_induced_abortion.html page 18

[2] A WOMAN'S RIGHT TO KNOW © 2003, Texas Department of Health, http://www.dshs.state.tx.us/wrtk/pdf/booklet.pdf)

"Some women may feel guilty, sad, or empty, while others may feel relief that the procedure is over. Some women have reported serious psychological effects after their abortion, including depression, grief, anxiety, lowered self-esteem, regret, suicidal thoughts and behavior, sexual dysfunction, avoidance of emotional attachments, flashbacks, and substance abuse. These emotions may appear immediately after an abortion or gradually over a longer period of time. These feelings may recur or be felt stronger at the time of another abortion, or a normal birth, or on the anniversary of the abortion...."

None of the possible adverse emotional effects of abortion were considered by the *Roe v. Wade* decision.

The booklet then considers "Future childbearing and infertility". The booklet states in part:

"The risks are fewer when the abortion is done in the early weeks of pregnancy. The further you are along in your pregnancy, the greater the chance of serious complications and the greater the chance of dying from the abortion procedure. Some complications associated with an abortion such as infection or a cut or torn cervix, may make it difficult or impossible to become pregnant in the future or to carry a pregnancy to term.

"Some large studies have reported a doubling of the risk of premature birth in later pregnancy if a woman has had two induced abortions. The same studies report an 800% increase in the risk of extremely early premature births (less than 28 weeks) for a woman who has experienced four or more induced abortions. Very premature babies, who have the highest risk of death, also have the highest risk for lasting disabilities such as mental retardation, cerebral palsy, lung and

gastrointestinal problems and vision and hearing loss."

Abortion may increase risk of breast cancer. The development of a baby in a woman's body is a complex, subtle procedure. The baby and the pregnant woman produce many hormones which help to control the pregnancy and to finally terminate the pregnancy in birth. The time ratio in hormone change between a normal pregnancy and an abortion is analogous to the difference in time ratio between a normal airplane landing and a crash.

In a normal pregnancy, all the signals are followed by the expected events. Hormone levels increase to help cause the expected events. The happening of expected events is detected. Feedback reduces hormone levels to the desired levels at desired rates.

In contrast to a normal pregnancy, while the woman's and baby's bodies are interacting via the typical actions and signals, abortion immediately terminates the pregnancy without the normal steps and changes in the hormonal interrelationships.

To illustrate, during the pregnancy, the breasts prepare to nurse the expected to be born baby. During certain stages of the pregnancy and their preparation for a live birth, the woman's breasts are more susceptible to the development of a pre-cancerous condition that makes the woman more susceptible to later breast cancer.

The Texas State Government pamphlet "A woman's right to know"[3] considers breast cancer risk possible as follows:

> "Your chances of getting breast cancer are affected by your pregnancy history. If you have carried a pregnancy to term as a young woman, you may be less likely to get breast cancer in the

---

[3] "A woman's right to Know", supra, fn. 2.

future. However you do not get the same protective effect if your pregnancy is ended by an abortion. The risk may be higher if your first pregnancy is aborted.

"While there are studies that have found an increased risk of developing breast cancer after an induced abortion, some studies have found no overall risk...."

Additional new knowledge which should cause this Court to revisit *Roe v. Wade* comprises in part: (1) visual color still photos and motion pictures taken primarily by ultrasound, (2) bad physical and emotional after effects caused by abortion and described by the Texas State booklet previously, that suggest that for many, perhaps most women, abortion is more dangerous than continuation of a temporarily unwanted pregnancy, (3) evidence that a pregnancy that is not wanted at the time most women decide to abort, frequently, perhaps usually, becomes very wanted at some later time causing the mothers to be relieved that they did not abort, (4) improvement in care of the tiniest humans so that ever younger babies can survive, many without relevant damage.

Abortion is attempting to solve one or more problems by terminating the pregnancy by killing and removing the body. If they are going to go through with the abortion, it is necessary for many women to avoid thinking about what an abortion is. Instead they focus on solving their problems and their hope that the abortion will help them solve their problems. Without this avoidance, it is difficult to perform abortions, assist in the performance of abortions, refer for abortions, have abortions, or favor the legality of abortion. Unfortunately for women who abort, the problems frequently continue or the avoidance may later become impossible causing them to be faced with haunting memories of what they did.

Today's technology goes far beyond that available in 1972, and makes it virtually impossible to hide the facts necessary to be hidden in order for a normal person to be pro-choice. Today anyone can find ultrasound images on the internet and see amazingly clear color motion picture images of not yet born humans doing many of the things that make infants seem so cute, and looking so much like a newborn as to lead to the conclusion that aborting them is not much different than killing a newborn.

Technology is trending toward enabling the survival of ever smaller human babies. Recently there was an article about a young woman who weighed less than 10 ounces at birth and grew up to become an honor student who plays the violin.[4]

Other articles recently described a baby of slightly over 8 ounces at birth who survived and was projected to go home within days. These advances make obsolete the premise of *Roe v. Wade* that babies born at less than six months have an insignificant chance to survive.

IV.

MODERN DATA INDICATES THAT ABORTION IS NOT SAFER THAN CHILDBIRTH

In 1973 in *Roe v Wade*, this Court held that early abortion was safer than continuation of the pregnancy to childbirth. Safer, as used by the Court, meant that aborting was less likely to immediately kill the woman compared to the risk of dying during or immediately after a pregnancy during the nine months before birth and the immediate post birth period.

Post-1973 data disagrees and shows that danger from abortion extends for many years after the abortion is apparently successfully performed without incident.

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[4] AP article, OC Register 8/19/2004, page News 9

Extending the time during which the danger of pregnancy and abortion are considered or comparing death rates after abortion and after child birth contradict the conclusion of the Court in *Roe v. Wade* because so much of the potential damage caused by abortion is not immediate.

The relative safety of abortion and child birth are questions that can be answered accurately by good science. This Court should rely on science, not opinion, the prior biases of justices, briefs which are by their very nature limited, argument to answer relevant scientific questions, or the other typical data input mechanisms used by appellate courts. Science is not theory. Science is theory as amended whenever new relevant facts are discovered. The nature of science usually prevents the answer of controversial complicated questions in a short time. The most effective way for this Court to compare death rates of abortion and childbirth, or to answer any other scientific questions of interest is to send this case back to the trial court with appropriate instructions.

The difference in suicide rates alone indicates that abortion is more dangerous than childbirth. According to a study by the Finnish Government,[5] women who have had an abortion have an increased risk of suicide. Information from death certificates of women aged 15-49 years was linked with national health records to find the recent reproductive history of the women who committed suicide. While the general rate of suicide for women of childbearing years was 11.3 per 100,000, among women who had an abortion the suicide rate was 34.7 per 100,000. Women in that age

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[5] Gissler, et al., SUICIDES AFTER PREGNANCY IN FINLAND, 1987-94:REGISTER LINKAGE STUDY, British Medical Journal, 313:3-12 1996). The Authors are members of the Unit of Statistics, Registers and Information Systems, National Research and Development Centre for Welfare and Health Institute of the Finnish Government Department of Mental Health.

group who had given birth had a suicide rate of 5.9 per 100,000.

The following analysis of California Government records agrees with the Finnish study that abortion is far more dangerous than childbirth.[6]

> "Abstract
>
> "Methods. California Medicaid records for 173, 279 women who had an induced abortion or a delivery in 1989 were linked to death certificates for 1989 to 1997.
>
> "Results. Compared with women who delivered, those who aborted had a significantly higher age-adjusted risk of death from all causes (1.62), from suicide (2.54), and from accidents (1.82), as well as a higher relative risk of death from natural causes (1.44)..."

If one compares similar countries that differ in re legality of abortion, abortion is associated with increased maternal mortality rate. For example,

Ireland, which had not legalized abortion, since 1980, has consistently had a lower maternal mortality rate than the United Kingdom, which is similar other than for legal abortion.[7] Amici suggest that the reasons may comprise residual physical and/or psychological damage caused by abortion.

V.

DEMOGRAPHIC CHANGES SUGGEST THAT ABORTION WILL SOON BE ILLEGAL REGARDLESS OF WHAT THIS COURT DOES

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[6] David C. Reardon, et al., "*Deaths Associated with Pregnancy Outcome*", quoted and cited in Thomas W. Strahan, "*DETRIMENTAL AFFECTS OF ABORTION: AN ANNOTATED BIBLIOGRAPHY WITH COMMENTARY*" (Springfield, IL: Acorn Books, 2000)

[7] UNICEF, The State of the World's Children, 1999, Table 7

European trends illustrate why and how demographic trends are changing the US abortion issue. This year Europe will have more deaths than births, a fertility rate below 1.4, less than 2/3 that necessary to maintain population, and a declining population. Polling data indirectly indicates and focus group interviews directly indicate that that portion of the US that supports legal abortion and the *Roe v. Wade* decision has demographic data similar to Europe and, perhaps because of abortion, is not reproducing itself.

In contrast, that part of the US which opposes legal abortion and opposes the *Roe v. Wade* decision is believed to have a fertility rate above replacement level, perhaps twice the fertility rate of the pro-legal-abortion population.

The US total fertility rate has declined by about one child per family to below replacement level since 1965, immediately before abortion became widespread. This fertility decline was followed a generation later by a shortage of young workers which has been one cause of massive immigration, so that the national origin of US population has changed and continues to change substantially as immigrants take the place of children not born to those who favor legal abortion.

VI.

THE *ROE V. WADE* DECISION PAVES THE WAY FOR ITS CHANGE BY MASSIVELY AFFECTING POLITICS

The *Roe v. Wade* decision affects most of the more important US elections. On average, there is a substantial benefit to candidates who oppose Roe v Wade, because for those who favor legal abortion, it is only one important issue. To the contrary, for most of those who favor the right to life, it is the most important issue, often more important than all other issues combined.

Part of the reason why it is so easy to use the *Roe v. Wade* decision to defeat so many Democratic and pro-choice candidates is that so many people believe that the *Roe v. Wade* decision is unjust and not based on a sufficient factual foundation, and that the 1973 Court unfairly legislated.

Accordingly, *Roe v. Wade* is perhaps the second most extreme case ever (after Dred Scott) of what goes wrong when the US Supreme Court is believed to act unfairly and unjustly. It is not only important that US Supreme Court procedures be fair and just, it is also important that US Supreme Court procedures and results seem to the public to be fair and just, if the decisions are to stand. As long as relief such as that sought by petitioner McCorvey is not granted, it will reduce the chance of election of pro-choice advocates, until *Roe v. Wade* is reversed by this Court or by Amendment or legislation.

Regardless of how this Court will ultimately rule on reversing Roe v Wade, it is in the public interest and in this Court's interest to grant the present petition and to order a factual proceeding to determine if there is a factual foundation supporting Roe v Wade. If the factual situation is re-examined, *Roe v. Wade* will no longer be seen so much as a decision obviously based on mere allegations rather than facts.

CONCLUSION

For the reasons submitted above, and in the petition, certiorari should be granted.

Date: 2/2/2005

RESPECTFULLY SUBMITTED,

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(14)

CASE # 04-967

In The Supreme Court Of The United States

NORMA MCCORVEY,
FORMERLY KNOWN AS JANE DOE

PETITIONER

Vs.

WILLIAM "BILL" HILL,
DALLAS COUNTY DISTRICT ATTORNEY

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE
THE BLACKSTONE INSTITUTE AND
VIRGINIA C. ARMSTRONG, PH.D., PRESIDENT,
IN SUPPORT OF PETITIONER

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BRIEF OF AMICI CURIAE

STATEMENT OF INTEREST

The Blackstone Institute is a 501(c)(3) enterprise which has been pursuing research and education since 1984. The mission of the Institute is to declare and defend the Judeo-Christian worldview of the Constitution, law, philosophy, and other related fields. The Institute is named for the eighteenth century British jurist, Sir William Blackstone, whose legal philosophy dominated English and American law until well into the twentieth century.

The Institute focuses on those fundamental national issues which stand at the intersection of constitutional law, theory, history, jurisprudence, public policy, and culture. One such issue is the sanctity of life. Blackstone is committed to the highest standards of scholarship and to working with Americans who both agree and disagree with its purposes and positions.

The Blackstone Institute's president is Virginia C. Armstrong, Ph.D. Dr. Armstrong is a career university professor who recently took early retirement from Hardin-Simmons University in Abilene, Texas. Dr. Armstrong was Director and Senior Professor of Legal Studies and Political Science. She founded the University's Legal Studies Program as well as the Texas Undergraduate Moot Court Association and served as the first Chairman of both. She also drafted problems argued in moot court competitions across Texas.

Dr. Armstrong wrote both her masters degree thesis and doctoral dissertation on the U. S. Supreme Court. She has written, spoken, and been interviewed widely on legal and constitutional topics and Christian apologetics. Dr. Armstrong now pursues her passion for research and education in a wide variety of venues across the nation. She also serves as National Chairman of Eagle Forum's Court Watch.

The Blackstone Institute and Dr. Armstrong have a vital interest in this litigation and bring to this debate an extraordinary knowledge of, and perspective on, the issues involved. Blackstone represents a significant group of Americans across the country whose voice deserves to be heard as expressed in this *amicus curiae* brief.

SUMMARY OF REASONS FOR GRANTING CERTIORARI

Roe v. Wade[1] should be overturned. It has spawned decisions which have created substantially different legal conditions from those prevailing before 1973 – decisions which violate several fundamental standards of American law. The two most recent decisions, and the decisions which raise the most basic questions of law, are *Planned Parenthood of Southeastern Pennsylvania v.* Casey[2] and *Stenberg v. Carhart.*[3]

These two decisions create manifest injustice as the term is used in Federal Rule of Civil Procedure 60. The decisions also violate the rule of law as referred to in *Casey*. *Casey* and *Stenberg* create uncertainty, inconsistency, and discontinuity in American law and are not rooted in the U. S. Constitution. Under these circumstances, the principle of *stare decisis,* which requires that judicial decisions line up with the ultimate American legal precedent, the Constitution, directs this Court to vacate, not reaffirm, *Roe.*

After thirty-two years of generating injustice and violations of the rule of law culminating in *Casey* and *Stenberg, Roe* should be put to rest. This Court should grant petitioner's request for a writ of certiorari and vacate the judgment in *Roe v. Wade.*

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[1] 410 U.S. 113 (1973).

[2] 505 U.S. 833 (1992).

[3] 530 U.S. 914 (2000).

REASONS FOR GRANTING CERTIORARI

I.

AMERICAN LAW PROVIDES FOR THE OVERTURNING OF PRECEDENTS UNDER CERTAIN CIRCUMSTANCES.

A. FEDERAL RULE OF CIVIL PROCEDURE 60(B) AND *PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA* ARTICULATE STANDARDS FOR OVERTURNING PRECEDENT.

The Court may vacate a judgment that is no longer equitable. Rule 60(b) states that "On motion, and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order . . . [when] it is no longer equitable that the judgment should have prospective application; . . . ."

A Rule 60 motion should be granted if the party seeking relief can show "a significant change either in factual conditions or in law."[4] This change can be in either "statutory or decisional law."[5] In the Court's most recent application of Rule 60(b) , it held that "the ['law of the case'] doctrine[6] does not apply if the court is 'convinced that [its prior decision] is clearly erroneous and would work a *manifest injustice.*'"[7]

"Manifest injustice" as used in Rule 60 occurs under at least two circumstances. First, injustice is "manifest" if it creates harm equal to, or greater than, the harm found by the Court to exist in *Agostini*.[8] Second, injustice is "manifest" if the court decision vio-

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[4] *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992).

[5] *Agostini v. Felton*, 521 U.S. 203, 215 (1997).

[6] *Id.* at 236 ("Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation.").

[7] *Id.* (emphasis added) (second alteration in original) (citation omitted).

[8] *Agostini v. Felton*, 521 U.S. 203 (1997) (citation omitted).

lates more than one of the three standards of certainty, consistency, and continuity as discussed throughout this brief.

The U. S. Supreme Court held in *Casey*[9] that "it is common wisdom that the rule of *stare decisis* is not an 'inexorable command,' and certainly it is not such in every constitutional case."[10] The Court's decision as to whether to overturn a precedent includes "test[ing] the consistency of overruling the holding with the ideal of *the rule of law*."[11] *Stare decisis*, defined as nothing more than adherence to a previous decision, does not trump the rule of law. Indeed, both the rule of law and the principle of *stare decisis* are best served when a previous decision that violates the Constitution is overturned.

B. BOTH THE RULE OF LAW AND JUSTICE IN AMERICA ARE CHARACTERIZED BY SEVERAL QUALITIES.

"The rule of law" is a concept which extends to the heart of America's legal system but has roots extending outside of law into the realm of philosophy. An apt definition of "the rule of law" is "the largely formal or procedural properties of a well-ordered legal system. Commonly, these properties are thought to include: a prohibition of arbitrary power (the lawgiver is also subject to the laws); laws that are general, prospective, clear, and consistent (capable of guiding conduct); and tribunals (courts) that are reasonably accessible and fairly structured to hear and determine legal claims."[12]

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[9] *Planned Parenthood of Southwestern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

[10] *Id.* at 854 (citation omitted).

[11] *Id.* at 834 (emphasis added).

[12] CAMBRIDGE DICTIONARY OF PHILOSOPHY 801 (2d ed. 1999).

"The rule of law" also encompasses the concept of doing justice. For a court to do injustice is *ipso facto* to violate the rule of law. A variety of authoritative dictionaries make this point.

"Justice is conformity of our actions and our will to the law."[13] "Justice" is "practical conformity to the laws and to principles of rectitude in the dealings of men with each other."[14] "At least since Aristotle, justice has commonly been identified both with obeying law and with treating everyone with fairness."[15]

The common thread running through these definitions of "justice" in varied dictionaries is that of conformity to law. Justice is a vital ingredient of the rule of law.

C. BOTH THE RULE OF LAW AND JUSTICE IN AMERICA REQUIRE THAT COURT DECISIONS MANIFEST CERTAINTY, CONSISTENCY, AND CONTINUITY.

Senator Sam Ervin, Jr., expressed the point well in saying that "a government of laws . . . [is] a government which rules by *certain, constant, and uniform* laws rather than by the arbitrary, uncertain, and inconstant wills of impatient men who happen to occupy for a fleeting moment of time legislative, executive, or judicial offices."[16] Ervin's use of the words, "certain, constant, and uniform" is synonymous with the qualities required of a mature legal system as described by Oxford Professor of Jurisprudence H.L.A. Hart.[17] For

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[13] BLACK'S LAW DICTIONARY 1002 (4th ed. 1968).

[14] WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE (1828 ed.).

[15] CAMBRIDGE DICTIONARY OF PHILOSOPHY 456 (2d ed. 1999)

[16] Senator Sam J. Ervin, Jr., *Judicial Verbicide: An Affront to the Constitution*, *in* BLUEPRINT FOR JUDICIAL REFORM 3, 5 (Patrick B. McGuigan and Randall R. Rader eds. 1981). (emphasis added).

[17] H.L.A. Hart, Concept of Law (1961). Hart is a preeminent leader of later twentieth century Anglo-American jurisprudence, particularly the movement known as "Neo-Analytic" or "Linguistic" Jurisprudence. "The work of H.L.A.

America to retain the mature legal system established by the Constitution, it must adhere to the standards articulated by Hart and embodied in the Constitution.

Hart asserts that every legal system begins with a set of "primary rules of obligation." These rules are successful only in a primitive society that is very closely knit, small, and stable. In these primitive societies, a group's attitudes toward "its own standard modes of behavior" provide the means for social control. However, as time passes, the legal system, by use of the primary rules of obligation alone, develops deficiencies.[18] The first deficiency is uncertainty. That is, primary rules do not identify what a "law" is. When does a "rule" become a "law" if there are no identifying marks for society to follow?

Second, primitive rules eventually lead to stagnation in law and society. Changes in the law are very slow and gradual and tend to lag behind circumstances and community needs. The *rate of change in the law* relative to changes in society is the basic problem about which Hart writes: "deliberately adapting the rules to changing circumstances" is his concern. It is therefore possible that changes in the law can be much more *rapid* than changes in society, rather than legal changes lagging behind societal changes. In this state, the system suffers from *convolution*, not *stagnation*.

Third, asserts Hart, primitive rules are inefficient – they do not provide an adequate way for settlement of disputes regarding which rules apply and when a rule

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Hart stands out as a leading effort [to apply the philosophy of linguistic analysis to law]." LEE CAMERON MCDONALD, WESTERN POLITICAL THEORY, 599 (1968). Professor Hart has been cited three times by the U.S. Supreme Court: in *Bowers v. Hardwick*, 478 U.S. 186, 212 (1986), (Blackmun, J., dissenting); *Roberts v. Louisiana*, 428 U.S. 325, 355 (1976) (White, J. dissenting); and *Furman v. Georgia*, 408 U.S. 238, 395 (1972) (Burger, C.J., dissenting).

[18] *Id.* at 89–91.

violation has occurred. In this kind of system, disputes continue interminably.

Because a system of primary rules is plagued by uncertainty, stagnation (or convolution), and inefficiency, secondary rules emerge.[19] Secondary rules consist of rules of recognition, change, and adjudication. As secondary rules and the primary rules merge into an integrated system, a mature legal system develops.[20] To counter uncertainty, "rules of recognition" emerge.[21] These identify when a rule becomes a law and the essential qualities of that "law."[22] To counter stagnation (or convolution), "rules of change" emerge to identify when laws are being legitimately changed, and specifying the persons and procedures involved.[23] Finally, to counter inefficiency, "rules of adjudication" emerge.[24] These rules specify when a primary rule has been broken, who is going to adjudicate the resulting dispute, and how.[25]

In summary, secondary rules have the following purposes. Rules of recognition produce *certainty* (as much as is possible in human society); that is, legal actions and standards (such as court decisions) can be objectively and clearly understood, and society can have the confidence that these objective and clear standards will guide future legal acts. Rules of change produce *continuity* between the present and the past; that is, current and past decisions are consistent with one another unless there is an authoritative, compelling reason for change in later decisions (as discussed

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[19] *Id.* at 90–91.

[20] *Id.* at 91.

[21] *Id.* at 92.

[22] *Id.* at 92–93.

[23] *Id.* at 93.

[24] *Id.* at 94.

[25] *Id.*

below). Rules of adjudication produce *consistency* among the various adjudicative actions; that is, a judicial decision should contain no internal inconsistencies, nor should judicial decisions existing at a particular point in time be inconsistent with one another.[26] These three standards are closely related to one another, and violation of one may inevitably produce violation of one or both or the other two.

The degree to which a court decision or line of decisions, fails to manifest certainty, consistency, and continuity is the degree to which the legal system digresses toward a primitive state.[27] Once a legal environment of uncertainty, inconsistency, and discontinuity exist, injustice and violations of the rule of law are inevitable.

D. THE TOUCHSTONE OF CERTAINTY, CONSISTENCY, AND CONTINUITY IS THE U. S. CONSTITUTION.

In the United States, Hart's rules of recognition, change, and adjudication are consistent with the U.S. Constitution. The Constitution creates a "rule of recognition" when it "recognizes" as the supreme law "This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States . . . ."[28] The Constitution sets forth a rule of change when it specifies the process for amending the document in Article V, and a rule of adjudication is illustrated when the Constitution declares that the national judicial power extends to "cases and controversies" which are spelled out in Article III.

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[26] *Id.* at 91–95.

[27] VIRGINIA ARMSTRONG ET AL., COURTING JUSTICE: A GUIDE TO JUDICIAL REFORM 36-37 (2000).

[28] U.S. CONST. art VI., cl. 2.

Therefore, certainty, consistency, and continuity – core characteristics of the rule of law and justice – require the courts in matters of constitutional interpretation to adhere to the Constitution as understood by reference to its text, the intent of its writers, and the American and English Common Law tradition in which the Constitution is moored. Constitutional interpretation is often difficult enough when there is a committed effort to rely on specific words, intent as revealed by manifold historical sources, and traditions likewise readily apprehendable. To ignore these resources is to plunge constitutional interpretation into an abyss of chaos, convolution, and contradiction.

Chief Justice John Marshall made this point when he wrote:

> To say that the intention of the instrument [*i.e.*, the U.S. Constitution] must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers; – is to repeat what has been already said more at large, and is all that can be necessary.[29]

The Constitution can provide the nation with certainty, consistency, and continuity only if courts understand the nature of the Constitution and the judiciary's power regarding it, and make decisions accordingly. The nature of the Constitution and judicial power were spelled out in the very court decision which created judicial review – *Marbury v. Madison*.[30] First, Chief Justice Marshall describes the Constitu-

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[29] *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting).

[30] 5 U.S. 137 (1803).

tion as "*fundamental*," "*supreme*," and "*permanent*."[31] Marshall then emphasizes that the judiciary is subordinate to, and governed by, the Constitution. "[T]he framers of the Constitution contemplated that instrument as a rule for the government of course, as well as of the legislature."[32] He adds, "How immoral to impose it [*i.e.*, an oath supporting the Constitution given to judges], if they were to be used as the instruments; and the knowing instruments for violating what they swear to support!"[33] He continues, "Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for *his* government?[34] Marshall summarizes with his famous aphorism, "The government of the United States has been emphatically termed a government of laws and not of men."[35]

Professor G. Edward White explains:

> Marshall's principal justification for independent judicial review was that judges did not make law, but merely "found" and "declared" it. Marshall's argument assumed that "law" was a universal body of principles, that those principles were "discoverable" by technically skilled persons, such as judges, that in "discovering," judges were merely stating "what the law was." The only power judges had, under Marshall's view was their *professional* power: their technical expertise enabled them to be better "finders" of law than other persons.[36]

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[31] *Id.* at 175-78.

[32] *Id.* at 179-80.

[33] *Id.* at 180.

[34] *Id.* (emphasis added).

[35] *Id.* at 163.

[36] G. Edward White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and Lessons of History*, 63 JUDICATURE 163 (1979).

The power of judicial review is rooted in these presuppositions, and any exercise of judicial review by any court is valid only to the extent to which judges are faithful to the Constitution and the judicial role as described herein.

The necessary relationship between the rule of law, justice, the Constitution, and the qualities of legal certainty, consistency, and continuity have been noted throughout American history. Professor Raoul Berger asserts that "The written Constitution was thus the highest expression of the 'rule of law,' designed to limit the exercise of power and to make the agents of the people accountable."[37] Justice Felix Frankfurter agrees: "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."[38]

II.

THE *CASEY* AND *STENBERG* DECISIONS, AS THE PROGENY OF *ROE*, PROVE THAT *ROE* SHOULD BE OVERTURNED UNDER THE STANDARDS DESCRIBED ABOVE.

A. *CASEY* AND *STENBERG* ARE INSEPARABLY RELATED TO *ROE* BUT ALSO REPRESENT A "SIGNIFICANT CHANGE IN THE LAW" WHICH ENGAGES RULE 60 IN THIS CONTROVERSY.

"Liberty finds no refuge in a jurisprudence of doubt."[39] Both as to their findings and their foundations, the Court's abortion decisions from 1973 through 2000 do indeed create a "jurisprudence of doubt," as discussed below. This "doubt" results from uncertainty, inconsistency, and discontinuity, and

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[37] RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 291 (1977).

[38] *Graves v. People of State of New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

[39] *Casey*, 505 U.S. at 844.

within particular decisions, among the decisions, and in the foundations of both law and fact upon which the decisions rest. Thus, the Court's abortion jurisprudence violates the rule of law and is productive of manifest injustice. These decisions have produced *significant changes in abortion law* as contemplated by Rule 60 since 1973 while retaining an inseparable relationship with *Roe*.[40]

Casey and *Stenberg* feed a jurisprudence of doubt with special vengeance. At the core of *Roe* was its ruling and supporting rationale creating a woman's constitutional right to an abortion.[41] *Casey* passionately reaffirmed *Roe*'s right to an abortion. *Stenberg* produced an extreme expansion of the right to an abortion. *Casey* and *Stenberg* rest on *Roe*. Without *Roe*, there would be no *Casey* or *Stenberg*; the latter two are the progeny of the first. If, therefore, the core of *Casey* and *Stenberg*, (*i.e.*, their rulings and rationale) are violative of the Rule of Law and productive of manifest injustice, *Roe* should be vacated. Because these lawless and unjust decisions are the type of jurisprudence that *Roe* is still producing after thirty-two years and dozens of intervening abortion decisions, the continued application of *Roe* would produce further manifest injustice and violations of the rule of law. The uncertainty, inconsistency, and discontinuity of *Casey* and *Stenberg* are considered below.

B. THESE CASES RELY ON DECISIONAL STANDARDS THAT ARE UNCERTAIN, INCONSISTENT, AND DISCONTINUOUS AND ARE *IPSO FACTO* INADEQUATE GROUNDS FOR UPHOLDING *ROE*.

1. The joint opinion in *Casey* professes to employ the process of "reasoned judg-

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[40] *See infra* part III.

[41] *Casey*, 505 U.S. at 848.

ment" – a concept without roots in the Constitution's text, history, earlier interpretations, or English Common Law.

The three justices of the *Casey* joint opinion assure us that "[this process] certainly has not been one where judges have felt free to roam where unguided speculation might take them."[42] At the same time, they admit that "No formula could serve as a substitute, in this area, for judgment and restraint."[43] But how does one define and apply "judgment" and "restraint" and correct misjudgment and lack of restraint? The process of "reasoned judgment" is not even employed in *Casey*'s progenitor (*i.e.*, *Roe*) nor in *Casey*'s successor (*i.e.*, *Stenberg*). Indeed, "reasoned judgment" could just as well produce anti-abortion decisions as well as *Casey* and *Stenberg*.[44] There is no certainty, consistency, or continuity to the exercise of "reasoned judgment." Other assertions in the joint opinion illustrate this fact.

One example of such assertion is the famous, but totally mystifying "mystery passage:" "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[45] The key terms in this definition of liberty have no objective foundation and are a recipe for anarchy.

Another example is the assertion that "Our obligation is to define the liberty of all, not to mandate our own moral cod[illegible]."[46] But a statement that something should be done (*i.e.*, "we have an *obligation*") is itself a statement of a moral standard, a value.

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[42] *Id.* at 850.

[43] *Id.* (quoting *Poe v. Ullman*, 367 U.S. 542 (1961).

[44] *Id.* at 982.

[45] *Id.* at 851.

[46] *Id.* at 850.

2. The "undue burden" standard is also without roots in the Constitution's text, history, earlier interpretation, or Common Law.

The "undue burden" standard pronounced in *Casey*[47] also suffers from deficiencies in the lack of an objective definition, clarity as to its application, and standards by which to weigh this value against other values. The joint opinion defines "undue burden" as "a substantial obstacle" to a woman's seeking an abortion.[48] But "substantial obstacle" is as unclear, uncertain, and inconsistent as "undue burden."

Such a standard leads inevitably to the dissension among the Justices about the application of "undue burden" in *Stenberg*.[49] It should have been predictable that *Casey* would lead to a 5-4 decision and eight opinions in *Stenberg*. As Justice Scalia points out in his dissent in *Stenberg*, "[the decision] has been arrived at by precisely the process *Casey* promised – a democratic vote by nine lawyers."[50] Furthermore, he rightly maintains that "it is a value judgment" and a vote "upon the pure policy question whether this limitation upon abortion is 'undue' – *i.e.*, goes too far."[51] Is this the "reasoned judgment" promised by the three-justice plurality in *Casey*?

The problematic nature of *Casey* as a precedent is further explained by Justice Scalia in his *Stenberg* dissent: "It would be unfortunate, however, if those who disagree with the result were induced to regard it as merely a regrettable misapplication of *Casey*. It is not that, but is *Casey's logical and entirely predictable*

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[47] *Casey*, 505 U.S. at 874.

[48] *Id.* at 877.

[49] *Stenberg*, 530 U.S. at 938-46

[50] *Id.* at 955.

[51] *Id.*

consequence."[52] The uncertainty created by the "undue burden" standard in *Casey* only furthers the "jurisprudence of doubt" in abortion law.

Justice Thomas, in his dissent in *Stenberg*, reinforces the lack of constitutional basis for the "undue burden" standard in *Casey* when he contends:

> [T]he joint opinion was constructed out of whole cloth. The standard set forth in the *Casey* plurality has no historical or doctrinal pedigree. The standard is a product of its authors' own philosophical views about abortion, and it should go without saying that it has no origins in or relationship to the Constitution and is, consequently, as illegitimate as the standard it purported to replace.[53]

Thus, because *Casey* fails to provide a constitutionally meaningful standard, it functions as a precedent, ironically, to license Courts to subjectively determine whether a particular restriction constitutes a "substantial obstacle." If the dispute in *Casey* itself between Justice Blackmun[54] and the joint opinion authors is insufficient evidence of the potential for varying interpretations, *Stenberg* powerfully illustrates the lack of certainty, consistency, and continuity which *Casey* produced.

The "undue burden" test is also inconsistent with the central holdings of *Roe* as cited by the Justices in *Casey*. The *Casey* test replaces the trimester framework and the "strict scrutiny standard" associated with "fundamental rights," both of which governed in *Roe*.[55] The *Casey* plurality attempts *a posteriori* to relegate these *Roe* tests to a non-binding position in

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[52] *Id.* at 953-54 (emphasis added).

[53] *Id.* at 982.

[54] *Casey*, 505 U.S. at 922-43 (stating that all of the challenged Pennsylvania provisions should have been struck down).

[55] *Id.* at 873, 877.

the 1973 ruling. But an objective reading of both cases supports the conclusion that the undue burden test is just as central to *Casey* as the trimester and strict scrutiny standards were to *Roe* – and the central themes of the two cases cannot be reconciled.

The *Casey* plurality is correct in stating that "Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw."[56] The Court has not justified the lines it purports to have drawn with the "reasoned judgment" and "undue burden" standards. It also has not justified its authority and ability to draw such lines in the first place. Consequently, the Court has produced abortion law that is uncertain, inconsistent, and discontinuous.

III.

STARE DECISIS IS NOT A BARRIER TO VACATING *ROE*

A. THIS COURT, AND ITS RECENT PREDECESSORS, HAVE BEEN GENEROUS IN OVERTURNING THEIR OWN PRECEDENTS.

David O'Brien reports the following statistics for the Warren Court: 236 over-turned acts (including 45 Supreme Court decisions); the Berger Court: 293 overturned acts (including 52 Supreme Court decisions); the Rehnquist Court through 1998: 134 overturned acts (including 30 Supreme Court decisions).[57] For the current Court to overturn a prominent case such a *Roe* would not be inconsistent with the Court's history.

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[56] *Id.* at 870.

[57] 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS 36 (4th ed. 2000).

B. THE COURT, IN *ROE*, *CASEY*, AND *STENBERG*, MISCONSTRUED THE NATURE OF *STARE DECISIS*.

The principle of *stare decisis*, important to American law and its English Common Law predecessor, contributes significantly to certainty, consistency, and continuity – if properly understood and applied. However, *Stare decisis* is not the ultimate governing principle in American law, especially at the level of constitutional decision-making.[58] An early Court observed "if they [*i.e.*, the courts] were absolutely bound by their prior decisions, they would be without the power to correct their own errors."[59] *Stare decisis* is especially limited in constitutional law. The Constitution is the ultimate precedent; and all court decisions must be measured against our basic organic law. The Courts in *Casey* and *Stenberg* misconstrue stare decisis by making case law superior to the Constitution. *Stare decisis* must be clearly, consistently, and continuously defined and applied. The surest guarantee that this will occur is to recognize the constitutional foundation of *stare decisis*."

Furthermore, the age of a court decision is not necessarily an indicator of its constitutional quality, or its legitimacy. For example, *Plessy v. Ferguson*[60] survived for fifty-eight years before being overturned by *Brown v. Topeka Board of Education*.[61] *Roe*'s life-time of thirty-two years is substantially less than *Plessy*'s.

C. NUMEROUS CHANGES IN LAW SINCE 1973 HAVE ALREADY UNDERMINED *ROE*.

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[58] *Casey*, 505 U.S. at 854.

[59] *Wood v. Brady*, 150 U.S. 18, 23 (1893).

[60], 163 U.S. 537 (1896).

[61] *Brown v. Topeka Board of Education* 347 U.S. 483 (1954).

Casey and *Stenberg*, especially *Casey*'s plurality, express the deepest concern about overturning *Roe*.[62] However, several of *Roe*'s important features have already been changed. These include abandonment of the trimester framework,[63] alteration in the classification of the right to an abortion as a "fundamental right,"[64] and an elevation in the importance of the unborn child's interests.[65]

Despite these changes, the *Casey* plurality avers that a major reason for clinging to *Roe* is because of the "reliance" placed upon it as a precedent.[66] But the "reliance" concept is deficient. Whose reliance is the ultimate standard? How much must a party rely on a precedent for the precedent to outweigh other values and interests? What kind of reliance is worthy of judicial notice – economic, psychological, social, physiological, all of the above, some of the above, or other forms? And how can the Court justify upholding *Roe*'s right to an abortion because of "reliance" when the Court has overruled so many other decisions (and portions of *Roe*) without any mention of "reliance." The "reliance" idea is unclear, inconsistent, and uncertain with other abortion precedents as well as the Constitution.

The limits on *stare decisis* have been aptly described by the high-ranking British Judge, Alfred Lord Denning, who reminded us in 1959, that "If lawyers hold to their precedents too closely, forgetful of the fundamental principles of truth and justice which they should serve, they may find the whole edifice comes

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[62] *Casey*, 505 U.S. at 854-69; *Stenberg*, 530 U.S. at 920-21.

[63] *Casey*, 505 U.S. at 873.

[64] *Id.* at 874-77.

[65] *Id.* at 873.

[66] *Id.* at 855-56.

tumbling around them."[67] In the United States, the "fundamental principles of truth and justice" which protect us are found in the correct interpretation of the Constitution. Court decisions to the contrary are not valid.

CONCLUSION

The principles of justice and the rule of law are foundational to American law and are rooted in the Constitution. Certainty, consistency, and continuity in court decisions are essential to justice and the rule of law. The Constitution is the ultimate embodiment of certainty, consistency, and continuity in American Law. *Stare decisis* is a major Anglo-American principle contributing to certainty, consistency, and continuity in judicial decisions when it is rooted in the Constitution. *Roe's* progeny, *Casey* and *Stenberg*, are not rooted in the Constitution. They contribute substantially to uncertainty, inconsistency, and discontinuity in law. They violate the rule of law and create injustices which are equal to, or greater than, the injustices found to be "manifest" in *Agostini*.

Therefore, this Court should grant petitioner's request for a writ of certiorari, vacate the judgment in *Roe v. Wade*, and grant all that relief requested in the petition.

February 7, 2005

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[67] Lord Edmund-Davies, *Lord Denning: Christian Advocate and Judge*, 2 CHRISTIAN LEGAL SOC'Y Q. 5, 7 (1981).

(3)

No. 04-967

Supreme Court, U.S.
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In The

Supreme Court of the United States

NORMA McCORVEY,
FORMERLY KNOWN AS JANE ROE,

Petitioner,

v.

WILLIAM "BILL" HILL, DALLAS COUNTY DISTRICT ATTORNEY, AS SUCCESSOR IN OFFICE TO HENRY WADE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* J. BUDZISZEWSKI IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* J. BUDZISZEWSKI IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted in support of the petitioner.[1] By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

J. Budziszewski, Ph.D. (Yale, 1981), is a Professor in the Departments of Government and Philosophy, University of Texas at Austin. He is a philosopher of ethics and politics specializing in conscience, moral honesty, and moral self-deception. His books include *True Tolerance* (1992), *Written on the Heart: The Case for Natural Law* (1997), *The Revenge of Conscience* (1999), and *What We Can't Not Know* (2003), and his scholarly articles and reviews have appeared in such journals as *The American Political Science Review* and *The American Review of Jurisprudence*.

SUMMARY OF THE ARGUMENT

The United States Supreme Court should re-evaluate *Roe v. Wade*, 410 U.S. 113 (1973), because of the destructive effect of abortions on women who have them. Certain foundational moral beliefs are so deeply rooted in the human moral intellect that it is impossible for the normal adult not to hold them. Among these is the wrong of deliberately taking innocent human life. Because of this, a woman who takes the life of her child violates her own

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that the brief was prepared in its entirety by *amicus curiae* and his counsel. No monetary contribution toward the preparation or submission of this brief was made by any other person other than *amicus curiae* and his counsel.

conscience – even if, in the foreground of moral awareness, she considers abortion to be morally licit. Conscience is not a mere passive barrier or inhibition, but an active force that avenges itself upon attempts to violate its integrity. For this reason, the woman's violation of her own conscience brings about profoundly destructive consequences. The affidavits of post-abortive women filed by Petitioner in the District Court confirm and illustrate these consequences.

ARGUMENT

I. The United States Supreme Court Should Re-Evaluate *Roe v. Wade* Because Of The Destructive Effect Of Abortion On Women Who Have Them.

When the U.S. Supreme Court declared, in *Roe v. Wade*[2] that the Constitution guarantees a right to abortion as a dimension of the right of privacy, it did so not through a narrow construction of the document's language – for, as Justice Blackmun wrote, "[t]he Constitution does not explicitly mention any right of privacy,"[3] much less any right to abortion – but through a broader argument based in large part on the assumption that women would be psychologically harmed should abortion be prohibited. Justice Blackmun explained as follows:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose

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[2] *Roe v. Wade*, 410 U.S. 113 (1973).

[3] *Id.* at 152.

> upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. *Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.* All these are factors the woman and her responsible physician necessarily will consider in consultation.[4]

Moreover, continued Justice Blackmun, the privacy right is not absolute: "this right is not unqualified and must be considered against important state interests in regulation,"[5] these interests including, *inter alia*, the protection of health.

Insofar as the abortion right depends on certain assumptions about human psychological health, its conclusion hinges upon whether these assumptions are true. Therefore, should these assumptions be called into question by new evidence, the Supreme Court should reconsider *Roe v. Wade*. This is in fact the case.

II. Certain Foundational Moral Beliefs Are So Deeply Rooted In The Human Moral Intellect That It Is Impossible For The Normal Adult Not To Hold Them.

There exist certain foundational moral beliefs that all people hold – principles that a normal human adult is

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[4] *Id.* at 153 (emphasis added).

[5] *Id.* at 154.

unable *not* to believe.[6] They are a universal inheritance of the human race. These include the knowledge of certain goods, such as the good of friendship; of certain formal norms, such as the norm of treating equals equally; and of certain everyday moral rules, such as the rule "Do not murder."[7]

Whether these universal beliefs are actually true does not concern us in this *amicus* brief. The important thing is that they are, in fact, universal. To be sure, culture and socialization play a substantial role in forming the details of moral belief. The basic beliefs of which we are speaking, however, constitute the universal background of the moral landscape, against which these details become visible. We may also think of them as the universal deep structure of conscience, by contrast with the culturally variable surface.[8] Surveying this universal background, anthropologist Clyde Kluckhohn writes:

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[6] We do not hold such moral beliefs merely because they are taught to us, but because they seem true in themselves. To say so does not in any way require the philosophically problematic claim that such beliefs are "innate." If they were innate, then we would be born with them; however, newborn infants are not yet capable of conceptual knowledge, and, in the strict sense, cannot be said to hold any beliefs whatsoever.

[7] For discussion of moral universals from various perspectives, see Donald E. Brown, *Human Universals* (McGraw Hill, 1991); J. Budziszewski, *What We Can't Not Know* (Spence, 2003); John M. Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980); Francis Fukuyama, *The Great Disruption: Human Nature and the Reconstitution of Social Order* (Simon and Schuster, 1999); and Neil Roughley, *Being Humans: Anthropological Universality and Particularity in Transdisciplinary Perspectives* (Walter de Gruyter, 2000).

[8] This distinction between the two levels of conscience is old in Western reflection. Classically, philosophical psychology has called these two levels *synderesis*, which we may paraphrase as "deep conscience," and *conscientia*, which we may paraphrase as "surface conscience." The first systematic treatise on conscience was written by Phillip the Chancellor and included in his *Summa de Bono*, written in the thirteenth century. The most influential account of the relationship between deep conscience and surface conscience is due to Thomas

(Continued on following page)

> Every culture has a concept of murder, distinguishing this from execution, killing in war, and other "justifiable homicides." The notions of incest and other regulations upon sexual behavior, of prohibitions upon untruth under defined circumstances, of restitution and reciprocity, of mutual obligations between parents and children – these and many other moral concepts are altogether universal.[9]

In the same vein, anthropologist John M. Cooper writes that:

> [T]he peoples of the world, however much they differ as to details of morality, hold universally, or with practical universality, to at least the following basic precepts. Respect the Supreme Being or the benevolent being or beings who take his place. Do not "blaspheme." Care for your children. Malicious murder or maiming, stealing, deliberate slander or "black" lying, when committed against friend or unoffending fellow clansman or tribesman, are reprehensible. Adultery proper is wrong, even though there be exceptional circumstances that permit or enjoin it and even though sexual relations among the unmarried may be viewed leniently. Incest is a heinous offense. This universal moral code agrees rather closely with our own Decalogue taken in a strictly literal sense.[10]

Aquinas, especially his *Quaestiones Disputatae de Veritate,* Questions 16 and 17, in the fourteenth. For discussion of the early texts, see Timothy C. Potts, *Conscience in Medieval Philosophy* (Cambridge University Press, 1980).

[9] Clyde Kluckhohn, *Ethical Relativity: Sic et Non*, 52 J. PHIL. 663, 663 (1955), *in* John Ladd, ed., *Ethical Relativism* 78-95 (University Press of America, 1985).

[10] John M. Cooper, *The Relations Between Religion and Morality in Primitive Culture, in* 4 *Primitive Man* [now *Anthropological Quarterly*] 36 (1931).

III. Among Such Foundational Moral Beliefs Is The Wrong Of Deliberately Taking Innocent Human Life.

The wrong of murder is acknowledged in all human cultures. To be sure, if murder were defined merely as "wrongful killing," then to say that murder is wrong would be merely circular. Such is the view of Judge Richard Posner:

> First, morality is local. There are no *interesting* moral universals. There are tautological ones, such as "Murder is wrong," where murder means "wrongful killing," and there are a few rudimentary principles of social cooperation – such as "Don't lie all the time" or "Don't break promises without *any* reason" or "Don't kill your relatives or neighbors indiscriminately" – that may be common to all human societies. If one wants to call these rudimentary principles the universal moral law, fine; but as a practical matter, no moral code can be criticized by appealing to norms that are valid across cultures, norms to which the code of a particular culture is a better or worse approximation. Those norms, the rudimentary principles of social cooperation that I have mentioned, are too abstract to serve as standards for moral judgment. Any meaningful moral realism is therefore out, and moral relativism (or rather a form of moral relativism to which I'll return shortly) is in.[11]

But only the most superficial consideration could support the conclusion that nothing more is meant by murder than "wrongful killing." True, not all killing is murder, and the injunction has not traditionally been taken to forbid self-defense, capital punishment, or just

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[11] Richard Posner, *The Oliver Wendell Holmes Lectures: The Problematics of Moral and Legal Theory,* 111 HARV. L. REV. 1637, 1640 (1998).

war. Even so, what makes killing wrong is not completely variable. Murder is everywhere understood to take in at least[12] the deliberate taking of innocent human life.

It may seem that the wrong of deliberately taking innocent human life could not really belong to the deep structure of human conscience, because there are cultural counterexamples. What about the Holocaust, for example? Surely Nazis had no scruples about killing innocents. Surprisingly, for all their cruelty, not even the Nazi death camp guards could expunge their consciences of the knowledge of the wrong of deliberately taking innocent human life. In order to carry out the killings, somehow they had to convince themselves that the wholesale extermination of Jews did not fit into this category. The Nazi propaganda theme of the *untermensch,* or underman, played into this effort by contending that the Jews were either not innocent, not human, or both. One SS pamphlet contended, "From a biological point of view he seems completely normal. He has hands and feet and a sort of brain. But, in fact, he is a completely different creature, a horror. He only looks human, with a human face, but his spirit is lower than that of an animal. A terrible chaos runs rampant in this creature, an awful urge for destruction, primitive desires, unparalleled evil, a monster, subhuman."[13] Jews were also dehumanized in other ways, for example by being herded naked from the train disembarkation platform to the barracks, so that they would seem like mere cattle to prison guards. Gitta Sereny asked Franz Stangl, the former commandant of the Treblinka death camp, "If they were going to kill them anyway, what was the point of all the humiliation, why the cruelty?" He

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[12] I say "at least" because additional forms of killing may also be considered murderous, for example the execution of a guilty person for light cause, without a fair trial, or by one without public authority to carry out the penalty.

[13] Tom Segev, *Soldiers of Evil: The Commandants of the Nazi Concentration Camps* 80 (Haim Watzman, trans., McGraw-Hill, 1987).

replied, "To condition those who actually had to carry out the policies. To make it possible for them to do what they did."[14]

In the end, not even these measures could fully deceive the deep structures of conscience; guilty knowledge remained an overwhelming burden for the exterminators. Psychologist Robert Jay Lifton reports on an interview with a former Wehrmacht neuropsychiatrist who had treated large numbers of death camp soldiers for psychological disorders. Their symptoms were much like those of combat troops, but were more severe and lasted longer. The men had the hardest time shooting women and children, especially children, and many of them had nightmares of punishment or retribution.[15]

We return below to the theme of conflict between deep conscience and surface moral belief. Such conflict is especially terrible in the case of abortion.

IV. Because The Wrong Of Deliberately Taking Innocent Human Life Is So Deeply Rooted In The Human Moral Intellect, A Woman Who Takes The Life Of Her Child Violates Her Own Conscience – Even If, In The Foreground Of Moral Awareness, She Considers Abortion To Be Morally Licit.

If deep conscience really does hold within it a belief in the wrong of deliberately taking innocent human life, then consider where this leaves a woman who has an abortion. Parsing the rule against murder, there are only six possibilities of rationalization. She may tell herself (1) that her act is not *deliberate,* (2) that she is not *taking* anything, (3)

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[14] Gitta Sereny, *Into That Darkness: An Examination of Conscience* 101 (Vintage Books, 1983) (1974).

[15] Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* 15 (Basic Books, 1986).

that the unborn child is not *innocent,* (4) that it is not *human,* (5) that it is not *alive,* or (6) that what is wrong *may be done.*

For purposes of the present analysis, the problem is not that all six lines of justification are literally unthinkable. Indeed, all six are commonly entertained. The problem, rather, is that they are so implausible as to require a large dose of self-deception to be accepted. At the moment of decision, a woman may try desperately to talk herself into the rightness of abortion, but it is impossible to believe it "all the way down." To see why this happens, let us consider the six rationalizations one at a time.

Possibility 1: "It is wrong to *deliberately* take innocent human life. But I didn't mean for this to happen; I wasn't trying to get pregnant." The reasoning here is that if something happens that I do not intend – in this case, pregnancy – then no matter what I do about it, I am not responsible. This line of thinking is incompatible with any coherent idea of personal responsibility. It is like saying "I didn't plan for my wife to become disabled, therefore I am not responsible for poisoning her."

Possibility 2: "It is wrong to deliberately *take* innocent human life. But I'm not taking life, the doctors are doing it. This is just something happening to me. I'm not involved." This time the underlying reasoning is that once I have made a decision, the results are out of my hands – even if I planned and intended them. It is like saying, "I didn't take my landlady's life. If you want to blame someone for her death, blame the hit man I hired, not me."

Possibility 3: "It is wrong to deliberately take *innocent* human life. But the fetus isn't innocent. It has invaded me, violated me, made me pregnant." The sole purpose of the uterus is to home and house the baby, who has no place else to go. Yet the baby is here regarded as akin to a trespasser or rapist. Although it is hard to imagine an actual pregnant woman taking this view, some abortion proponents consider it quite promising, perhaps because

judges will sometimes believe things that ordinary women cannot. Thus, attorney Eileen McDonagh writes that the fetus is "objectively at fault for causing pregnancy."[16] It is "not innocent," she says, "but instead aggressively intrudes on a woman's body so massively that deadly force is justified to stop it."[17] Although "some might suggest that the solution to coercive pregnancy is simply for the woman to wait until the fetus is born," she complains that "[t]his type of reasoning is akin to suggesting that a woman being raped should wait until the rape is over rather than stopping the rapist."[18] Yet even McDonagh admits, in an unintentional testimony to the enduring power of the deep structures of conscience, "[f]ew people are going to be comfortable with the idea."[19]

Possibility 4: "It is wrong to deliberately take innocent *human* life. But it's not human – it can't feel, it can't think, it can't communicate – and how could it be human if it's so small?" Among pro-abortion philosophers, this rationalization is by far the most popular.[20] The reasoning is that human personhood, *who-ness,* depends on criteria like sensitivity, intelligence, and self-awareness, and the fetus is just a *what.* Of course born people too can be more or less sensitive, more or less intelligent, more or less self-aware. Therefore, by this reasoning, born people too must be unequally endowed with personhood – some more, some less. The only question is whom we shall have as our masters. At the top may be those with the most exquisite feelings, the most complex thoughts, the keenest sense of self – it is not difficult to guess who these philosophers

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[16] Eileen L. McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* 36 (Oxford University Press, 1996).

[17] *Id.* at 192.

[18] *Id.* at 11-12.

[19] *Id.* at 192.

[20] *See* Budziszewski, *supra* note 7, at ch. 3.

have in mind. At any rate, such arguments merely touch the surface of moral awareness. It is a matter of everyday observation that pregnant women do think of their fetuses as human persons, and the thought comes back to haunt those who have had abortions. They view themselves as having violated not only the prohibition of murder but also the duty to care for their babies.

Possibility 5: "It is wrong to deliberately take innocent human *life*. But it's not alive, not truly. It's more like a blood clot. Or like my period just won't come down." Such a thing was easier for a woman to believe before the discovery of the nature of conception. It takes a ferocious act of denial to go on believing it in an age of moving ultrasound pictures. Blood clots do not roll over and suck their thumbs.

Possibility 6: "It is *wrong* to deliberately take innocent human life. But sometimes you have to do what's wrong." Logically, this option is nonsense. That something must not be done is what it means for it to be wrong; to deny that wrong may not be done is to say that wrong is not wrong, or that what must not be done may be done. Psychologically, however, the option is tempting: "I just can't have a baby right now. . . . My parents would have a fit. . . . My boyfriend would leave me." The pattern of the temptation is ancient: "Let me do evil that good may result." Some women who do what they themselves consciously regard as wrong try to square the act with perceived moral law by resolving to be sorry later. Whatever the ethical status of such a resolution, it is psychologically devastating. By making it, one literally calls down upon oneself the Furies of conscience.

When a woman talks herself into a justifying script that she cannot really believe "all the way down," then her surface moral beliefs, such as they are, are at war with her deep conscience. This produces disastrous consequences.

V. Conscience Is Not A Mere Passive Barrier Or Inhibition, But An Active Force That Avenges Itself Upon Attempts To Violate Its Integrity. For This Reason, The Woman's Violation Of Her Own Conscience Brings About Profoundly Destructive Consequences.

Conscience operates in three modes. Two of these are matters of everyday observation. In the cautionary mode, conscience alerts us to the peril of moral wrong and generates an inhibition against committing it; in the accusatory mode, it indicts us for wrong we have already done. Again it must be emphasized that for purposes of this analysis, the question is not whether what deep conscience brands as wrong is really wrong, but only what happens when we violate it.

In its accusatory mode, the most obvious and well-known way in which conscience indicts us is through the feeling of remorse. However, remorse is the least of the Furies, for no one always feels remorse for doing wrong, and some people never do. Yet even when remorse is absent, the recognition of guilt generates profound and often hidden psychological needs for confession, atonement, reconciliation, and justification. These other four Furies may be called the greater sisters of remorse: Inflexible, inexorable, and relentless, demanding satisfaction even when mere feelings are suppressed, fade away, or never come.

For this reason conscience may be said to operate not only in the cautionary and accusatory modes but in a harrowing third mode as well: The avenger, which punishes us when we act against its dictates. Conscience is therefore teacher, judge, or executioner, depending on the mode in which it is working – cautionary, accusatory, or avenging.

How the avenging mode works is not difficult to understand. The normal outlet of remorse is to flee from wrong; of the need for confession, to admit what one has

done; of atonement, to pay the debt; of reconciliation, to restore the bonds one has broken; and of justification, to get back in the right. But a prerequisite for these outlets is acknowledging that one has done wrong and turning away from the wrong. When surface moral belief is at war with deep conscience – when it goes on insisting that the deed was blameless – then such acknowledgement of wrong is impossible, and the normal outlets of the Furies are blocked. Denied their payment in the normal coin, they exact payment in whatever coin comes nearest, driving the life of the one who has committed the deed yet further out of kilter.

For example, a woman who has assaulted her own conscience may flee not from wrong, but from thinking about it. In order to keep from thinking about it, she may seek chemical assistance in drugs or alcohol. Refusing herself the relief of explicit confession, she may compulsively tell every detail of her story except the moral. She may punish herself again and again, paying pain after pain, price after price, because she cannot undo what she has done. She may simulate the restoration of broken intimacy by entering substitute relationships, or she may punish herself further by allowing herself only dysfunctional relationships. She may deny herself children, or after having children, she may refuse to allow herself to bond with them. She may seek a new pregnancy to bring back the lost child, but burden the new child with her effort to make it compensate for the aborted one. Or she may punish herself by ending the new pregnancy too. In this way a cycle of destruction may take place, each new abortion pushing up the ratchet of guilt another notch – simultaneously strengthening both her urge to become pregnant again, and her urge to punish herself for her last abortion by ending any new pregnancy that occurs. Finally she may exhaust herself in the futile effort to keep up the justifying script, to convince herself somehow that what deep conscience tells her is not true.

VI. The Affidavits Of Post-Abortive Women Submitted To The District Court In This Case Confirm That The Violation Of Conscience Has Destructive Consequences.

The affidavits of post-abortive women submitted to the District Court in this case confirm and illustrate the destructive consequences of assaulting one's own conscience explained in the preceding section.

A number of the women speak of remorse, shame, self-accusation, and self-hatred. Robin in Tennessee writes "I felt so guilty and ashamed. I considered myself a murderer and unworthy of life."[21] Nancy in New Mexico comments on her "uncontrolled weeping" and inability to achieve stability in life.[22] Becky in Texas says that her abortion "killed my spirit. . . . Caused me to question if I deserve to have kids, could be a good parent, should work with kids, may love kids." Mary in Georgia, asked how her abortion has affected her life, replies simply "It's been *hell!!!*", and goes on to speak of grief, anger, low self-esteem, condemnation, and feelings of "immense regret." Catherine in Arizona states "I have lived with regrets and feelings of guilt since 1974."[23]

An interesting note in these affidavits is the women's amazement over the depth and intensity of their own remorse. R.G. in Florida says that for years, her guilt and shame were "unexplained" – in other words, she had not expected it and did not at first understand its source.[24] Becky in Texas concludes "I think those who don't suffer this, don't grasp the magnitude of the act." She contrasts it

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[21] *Appendix to Petition for Certiorari* at 116 [hereafter *Pet. App.*].

[22] The original affidavits for which citations to Petitioner's Appendix were not available can be found at http://www.operationoutcry.org/stories/storiesDir.asp.

[23] *Pet. App.* at 48.

[24] *Id.* at 86.

with chopping down a tree and saying "We'll plant more"; the tree can be replaced, the child is unique and cannot be.

The post-abortive women speak of other dimensions of agony as well, especially grief and sense of loss. Judith in New Mexico laments that "To this day I still cry and miss my two children. I felt a terrible void." Lori in Texas writes that her abortion "has affected every emotion, every relationship, every idea. There isn't a day that goes by that I don't think of my children." According to Robin in Tennessee, "I constantly thought about how the child looked, eye color, smell, complexion."[25] Other post-abortive women speak in their affidavits of nightmares, depression, anxiety, and anorexia.[26]

Withdrawal and avoidance are common psychological responses to the trauma of abortion among the women who have submitted affidavits. As Tara in Hawaii explains, "Mentally, I had to deal with the fact that I killed my child, yet think clearly, which was impossible to do for a while." In the same vein, Susan in Florida submits that she suffered "a numbness for years and years" along with "separation from God." We read in the affidavit of Terrie in Texas that "My abortion so traumatized me that it was 10 years before I could even talk about it. Now – 23 years later – I cannot even think about what an awful thing I did to my own baby without crying."[27] Another way to flee from remorse is to use mind-altering substances. Lori in Texas speaks for many of the women submitting affidavits when she writes, "I did many things to medicate my pain which led to a snowball effect of trying to medicate my pain." Quite a few of them began to abuse alcohol or drugs following their abortions.

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[25] *Id.* at 117.

[26] *See, e.g., id.* at 90, 96, 109, 138, 141.

[27] *Id.* at 68.

In the previous section of this Argument we spoke of the confessional need produced by assault upon conscience; the fact that the affidavits were submitted at all evidences the need to confess. Some of the women are explicit, however, about the confessional need. The most articulate of these is Mary in California, who explains "I am now a counselor for others, after 30 years of emotional mental healing. The damage was overwhelming and I didn't understand why depression, drug & alcohol overwhelmed my life. I do now and I tell others of the consequences of an abortion."

Also prominent in the previous section of this Argument was the psychological need to atone, the sense that one must pay a price. One form this takes is the impulse to self-destruction. A number of the women explain that they have attempted suicide, some of them multiple times; others that they have suffered from suicidal thoughts; many of the other affidavits describe other forms of self-destructive behavior. In answer to the question "How has your abortion affected you?" Lori in Texas says that she suffered suicidal thoughts for several years, followed by an "inability *and unwillingness* to have a successful life."[28] Robin in Tennessee writes that she considered herself "a murderer and unworthy of life. . . . There were times when I wished I would just stop breathing."[29] The deep sense of a debt that must be paid produces in some of the women an obsessive fear of losing subsequent children as punishment for having aborted previous children. Both Robin in Tennessee and Terrie in Texas speak of the burden of such forebodings; Terrie writes that "It has always been a struggle for me not to think" this way.[30]

There are at least two reasons to expect disorders in interpersonal relationships in the aftermath of abortion.

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[28] Emphasis added.

[29] *Id.* at 116.

[30] *Id.* at 68.

One is that the consciousness of guilt isolates us. We cannot but feel that to take a life is to break sacred bonds, and having violated such intimacy, we feel that we no longer deserve it from others. The other reason arises from the very different fact that a woman who has an unexpected pregnancy is so often subjected to strong pressure *from* other people to do what conscience forbids. This causes her to feel not only that she cannot be trusted herself, but also that others cannot be trusted either. We find illustrations of both of these phenomena in the responses of post-abortive women to the question "How has your abortion affected others in your life?"

One common theme in the affidavits of post-abortive women is problems in relationships with men in the aftermath of abortion. For example, Lisa in Kentucky writes that her abortions have "affected every relationship I've had with men," Robin in Tennessee writes that following her abortion, "sex, love, romance with my husband is/was extremely difficult," and Susan in Florida speaks of a broken marriage and "many sexual partners – always looking for love in the wrong places." Tara in Hawaii writes that after her abortion she developed an anger toward her boyfriend that persisted after she married him. A number of the women point to their abortions as contributing to divorce.

A second theme in the affidavits is problems in relationships with children after abortion. Susan in Florida speaks of her acquired "distaste" for children. In the same vein, Camelia in Texas writes that she had "difficulty in bonding with my living children."[31] At the other end of the spectrum is compensation. Elizabeth in California speaks of being "smothering" towards her children.[32]

Many of the post-abortive women say that after abortion they have suffered problems in relating not only to men or to

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[31] *Id.* at 120.

[32] *Id.* at 59.

children, but also to people in general. For example, Karen in Broward County, Florida, writes "Because of my own emotional state of mind, and guilt, I have kept everything inside and have not been free to give my life to other people." Lana in Texas speaks of "anger between everyone in my life and myself." Lori in Texas explains that "for many years I hated people, myself, life and that causes an inability to have deep personal relationships." Tara in Hawaii writes simply that she "did not want to be around others."

The last of the phenomena that our analysis of conscience has led us to expect is that attempts at self-justification for abortion ultimately fail. The affidavits bear out this expectation. R.G. in Florida appears baffled; she complains poignantly, "And it is so difficult to heal because even though 'choice' is [acc]epted, to have had an abortion is tabu. How can that be?"[33] Candice in California has come to recognize the clash between her conscience on the one hand and the common rationalizations for abortion on the other. In answer to the question, "Based on your experience, what would you tell a court that believes abortion should be legal?", she writes "I would tell them that I was raped and therefore 'justified' in my abortion, but it didn't change a thing. I still suffered because I was led to believe that taking my child's life was OK. It was not & I have been living with that for almost five years."[34] S.C. in Georgia poignantly writes "[i]f I was only carrying a 'clump of tissues' why was my heart ripped out after the procedure was performed?"[35]

A similar awareness of the clash is found in the affidavit of Carmen in Georgia. *How has your abortion affected you?* "I was okay with it until after it happened. I. . . . felt like I had done something very wrong." *Were you adequately informed of the consequences of abortion?* "No, I

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[33] *Id.* at 86.

[34] *Id.* at 110.

[35] *Id.* at 60.

really believed the baby was not formed, or alive." *Were you adequately informed of the nature of abortion, what it is, what it does?* "I was told what was to happen. But that went around the facts. That a baby was to die."

With admirable insight, Carmen distinguishes between what she actually believed deep down, and what she tried to make herself believe in order to go through with the act. In reply to the question "Did anyone pressure you into having an abortion?", she reports "I wanted to believe that I couldn't handle [having a child]. I thought my life would end if I had another child."

Those four words, "I wanted to believe," express hard-won moral honesty often lacking, judging from the affidavits, among the personnel of abortion facilities. Writes H.H. in Texas, "I was told that the baby was not alive, that there was no reason to feel badly." Patti in Arkansas submits, "I was told it was not a baby yet." According to Karen in Broward County, Florida, "I was told it was a simple procedure to remove 'some tissue.'" Kelli in Kentucky explains that "The people at the clinic . . . kept referring to the baby as the 'contents of my uterus.'" Why abortion facility personnel would employ such euphemisms, however, is not difficult to understand. They had their own consciences to deal with.

CONCLUSION

The wrong of deliberately taking innocent human life is so profoundly lodged in the human moral intellect that it is impossible for the normal adult woman not to experience participation in abortion as an assault on her own conscience. To be sure, a woman who participates in abortion may talk herself into a justification for abortion that seems adequate at the time. The problem is that such justifications do not achieve conviction "all the way down." Whatever conviction they bring about may be emotionally charged, but lies only on the surface, and the structures of deep conscience rebel. The resulting interior conflict is

profoundly damaging to the woman who has had the abortion.

As the above analysis leads one to expect – and as the affidavits of post-abortive women filed with the District Court in this case confirm and illustrate – such damage manifests itself in such forms as remorse, shame, self-accusation, self-hatred, and anger; inconsolable feelings of grief, loss, and regret; nightmares, depression, and anxiety; numbness, withdrawal, avoidance, and difficulty in thinking clearly; the sense that one must atone, or pay a debt; efforts to carry out such atonement, including suicide and other self-destructive behavior; fear of punishment by God; abuse of alcohol or drugs, either to medicate one's pain or to further atone for one's deed; disturbances in relationships with men, with children (including one's own), and with people in general; profound mistrust of self as well as others; and, finally, collapse of the justifying script.

Insofar as abortion brings about such profoundly destructive effects on women who participate in them, a pivotal assumption of *Roe v. Wade* – that a right to abortion *upholds* the well being of women – is called radically into question. The Supreme Court should therefore grant the petition for a writ of certiorari and reconsider *Roe v. Wade*.

Respectfully submitted,

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In The Supreme Court of the United States

NORMA McCORVEY,
FORMERLY KNOWN AS JANE ROE,

Petitioner,

v.

WILLIAM "BILL" HILL, DALLAS COUNTY
DISTRICT ATTORNEY, AS SUCCESSOR
IN OFFICE TO HENRY WADE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Should the original judgment in *Roe v. Wade*, 410 U.S. 113 (1973), be vacated under Federal Rule of Civil Procedure 60(b) due to substantially changed factual and/or legal conditions that make *Roe* no longer just or equitable for prospective application?

2. Is Petitioner Norma McCorvey (formerly known as Jane Roe) entitled under Federal Rule of Civil Procedure 60(b) to any relief, substantive or procedural?

3. Should the Court, at a minimum, require a hearing to afford fundamental due process that would lead to determining whether *Roe v. Wade* should be re-examined?

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*[1]

The Christian Legal Society ("CLS"), founded in 1961, is a nonprofit interdenominational association of almost 3,000 Christian attorneys, law students, law professors, and judges. CLS has attorney chapters or fellowships in most States and accredited law schools.

From inception in 1975, the primary mission of CLS' legal advocacy and information arm, the Center for Law and Religious Freedom, has been to defend and advance the religious freedom of all Americans. Since 1980, the Center has filed briefs *amicus curiae* in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before this Court involving church-state relations.

As explained below, prior to 1992, CLS' Center did not take an official position on the issue of abortion. However, from its earliest years, CLS and its members sought to thoughtfully engage this difficult issue with wisdom and legal skill. CLS first formally addressed the issue of abortion in 1968, when its official publication, THE CHRISTIAN LAWYER, published an article that urged support for the model "Therapeutic Abortion Act" proposed by the American Law Institute ("ALI").[2] The article explained that the ALI model act would decriminalize abortion in certain narrowly defined circumstances, placing great weight upon the importance of

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[1] This *amicus curiae* brief is submitted in support of the Petitioner. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the *amicus* discloses that: (1) no counsel for a party authored this brief, in whole or in part; and (2) *amicus* CLS has applied to the Alliance Defense Fund (ADF) for a monetary contribution to cover expenses incurred in the preparation of this brief. ADF is a 501(c)(3) organization with offices at 15333 North Pima Road, Suite 165, Scottsdale, AZ 85260. ADF exercised no control over the content of this brief.

[2] *See* Thomas F. Lambert, Jr., *Legal Rights of the Fetus*, 1 THE CHRISTIAN LAWYER 23 (Fall 1968).

professional medical care and the strong doctor-patient relationship between a pregnant woman and her physician.[3] In 1971, THE CHRISTIAN LAWYER published a series of articles strongly questioning the morality, medical necessity, and common law precedent for such decriminalization.

Following this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), many Christian Legal Society members became involved in the pro-life movement, but CLS did not take a formal position on the issue for almost twenty years. In October 1992, following the Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and the American Bar Association's unprecedented decision that year to support abortion on demand, CLS took its first affirmative pro-life position when it authorized its Center for Law and Religious Freedom to begin to undertake legal advocacy on abortion. CLS' Center therefore expanded its mission to include defending the sanctity of human life from conception to natural death. In the twelve years since that time, CLS, through its Center, has advocated on behalf of the inalienable right to life of innocent human life, from conception through natural death, in state and federal courts throughout the nation.

CLS and many of its members not only advocate on behalf of unborn human life, but also work to create a society that will embrace and care for both mother and child. To this end, CLS and many of its members have worked to help develop legal and social mechanisms that will address the needs of women who might otherwise pursue abortions. In the course of these efforts, CLS and CLS members, among other things, have supported the adoption and development of "Safe Haven" laws, discussed in detail in this brief, to enable pregnant women to surrender undesired newborn children into nurturing care rather than to terminate the child's life while unborn.

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[3] The ALI model act was included as Appendix B to the Opinion of the Court in *Roe*'s companion case, *Doe v. Bolton*, 410 U.S. 179, 182, 205-07 (1973).

Amicus CLS believes that pro-life service to women in crisis and pro-life advocacy on behalf of legal reform are expressions of our highest ideals as citizens of the United States. CLS affirms the nobility of the American democratic experiment in ordered liberty. CLS affirms the rule of law and the principle of equal protection under the law, even as it works to reform constitutional and statutory law so that the American legal system is, once again, congruent with the Founders' claim that the inalienable right to life is one of the great moral truths on which American democracy rests. CLS seeks an America that is open, hospitable, and caring – a community of civic friendship in which neighbors reach out to assist neighbors in distress. CLS believes the pro-life cause is an expression of the premise and promise of American democracy. The premise is that we are all created equal; the promise is that there is justice for all.

For all the reasons not known or considered by this Court in its *Roe* and *Casey* decisions, but now raised in an abundant and compelling testimonial and scientific record proffered below and lodged with the Clerk of this Court by the Petitioner in this case (as she was in *Roe*), *amicus* urges this Court under Federal Rule 60(b) at the very least to permit the record in *Roe* to be re-opened and a hearing granted by the district court to permit the Petitioner to show how and why the abortion license has done grave damage to America: killing tens of millions of unborn children, marginalizing fathers in our society, and, most importantly for purposes of this case, causing untold harm and anguish to mothers who have been largely denied the medical care and informed consent anticipated in *Roe* while they lost their most unique constitutional right – the right to a relationship with their child.

Accordingly, the renewal of American democracy now compels *amicus* CLS to stand for the inalienable right-to-life of the unborn and to stand with women in crisis. For the sake of our most fundamental and highest constitutional principles, CLS stands against the abortion license as it is currently authorized and practiced in this country. CLS looks to a day when every child, born or unborn, is protected in law and welcomed in life.

For these reasons, *amicus curiae* Christian Legal Society has a vital interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

This Court has indicated that when the facts supporting a constitutional decision – even a "watershed" decision such as *Roe v. Wade* – "have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," that decision should be reexamined, and modified or overruled, by this Court.[4] Yet such reexamination cannot occur unless the material facts that "have so changed, or come to be seen so differently," may be introduced into evidence before a court with authority to consider them.

Submission of evidence of significantly changed facts and factual understandings is precisely the purpose of Petitioner's underlying Rule 60(b) motion. The majority opinion in *Roe* was based upon significant number of factual assumptions that were believed true at the time but have since been proved incorrect or false. Petitioner's Rule 60(b) motion proffered voluminous testimonial, medical, and scientific evidence of such material factual changes and asked that the District Court conduct an evidentiary hearing regarding that evidence, yet the District Court summarily denied that motion.

Among the many material facts that have "changed from those which furnished the claimed justifications for the earlier constitutional resolutions"[5] in *Roe,* the enactment in forty-six states of "Safe Haven" or "Baby Moses" laws is particularly significant. These Safe Haven laws have all been enacted subsequent to the decisions in *Roe*

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[4] *See Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (hereinafter "Joint Opinion").

[5] *See Casey*, 505 U.S. at 863 (Joint Opinion).

and in *Casey*, and the vast majority have been enacted subsequent to *Stenberg v. Carhart*, 530 U.S. 914 (2000). Such laws afford a pregnant woman the right to safely relinquish an unwanted newborn child into proper care while remaining anonymous and without fear of criminal or civil liability. Such laws empower the recipient "safe haven" to care for the infant until turning it over to the state for adoption. These mechanisms significantly reduce the primary potential adverse effects of maternity identified by the *Roe* majority in support of its conclusion.

This Court's decisions in *Agostini v. Felton* and in *Casey* provide the critical constitutional principles that permit this Court to grant the petition. Both articulate the principle that significant changes in the facts or law underlying an earlier constitutional decision of this Court warrant revisiting and even reversing that decision.[6] *Casey* provides the corollary that such action may be required not only by changes in the facts *per se*, but also by changes in the way that such facts have come to be seen or understood.[7] Finally, *Agostini* establishes that Rule 60(b)(5) is the appropriate mechanism for a *party* to the earlier decision to seek such reexamination and reversal.[8]

Amicus Christian Legal Society therefore respectfully urges this Court to grant the petition, vacate the rulings below, and remand this case to the District Court with instructions to conduct an evidentiary hearing and determine in the first instance whether there are significant changes in the facts and factual understandings underlying the *Roe* decision that make its prospective application unjust or inequitable.

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[6] *See Agostini v. Felton*, 521 U.S. 203, 215 (1997); *Casey*, 505 U.S. at 854-55, 863 (Joint Opinion).

[7] *See Casey*, 505 U.S. at 854 (Joint Opinion).

[8] *See Agostini*, 521 U.S. at 238-40.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED TO PERMIT THE FEDERAL COURTS TO CONSIDER SIGNIFICANT CHANGES IN THE MATERIAL FACTS RELIED UPON IN *ROE V. WADE*.

Whenever the facts supporting a constitutional decision of this Court "have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," that decision should be re-examined by this Court.[9] Even a "watershed" constitutional decision, such as *Roe v. Wade*,[10] should be overruled or modified when justified based upon "facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions."[11]

Yet such reexamination cannot occur unless the material facts that "have so changed, or come to be seen so differently," may be introduced into evidence before a court with authority to consider them. Submission of such evidence and consideration of such changed facts and factual understandings is precisely the purpose of Petitioner's underlying Rule 60(b) motion. That motion asked that the District Court conduct an evidentiary hearing regarding material factual changes that might require vacating the 1973 judgment in Petitioner's favor in the original *Roe* litigation.[12]

Petitioner's motion arises from her recognition that the relevant scientific, medical, legal, and philosophical facts as they exist and are understood today do not support the position she took nor the relief she obtained in *Roe v. Wade*, and, more significantly, do not support the majority opinion in *Roe*. The majority opinion in *Roe* was

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[9] *See Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (hereinafter "Joint Opinion").

[10] *Roe v. Wade*, 410 U.S. 113 (1973).

[11] *See Casey*, 505 U.S. at 863 (Joint Opinion).

[12] *See* Petitioner Norma McCorvey's *Rule 60 Motion for Relief from Judgment*, Petitioner's Appendix at 163-88.

based upon significant factual assumptions that were believed true at the time but have since been proved incorrect or false.[13] This may reflect, at least in part, the abbreviated process that the *Roe* case went through in the District Court, which ruled based upon affidavits and summary judgment motions without benefit of an evidentiary hearing, let alone a full trial.[14] As a result, most of the medical and scientific information considered by the Court and relied upon in Justice Blackmun's majority opinion was introduced for the first time in the Supreme Court,[15] or uncovered by the research of individual Justices.[16] In this

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[13] *Cf. Doe v. Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring) ("I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion").

[14] Roe filed suit on March 3, 1970. *See Roe*, 410 U.S. at 120. Upon the filing of affidavits, motions were made for dismissal and for summary judgment. *See id.* at 122. The hearing on those motions took place in Dallas on May 22, 1970, and lasted just a few hours. *See* Sarah Weddington, *The Donahue Lecture Series: "Roe v. Wade: Past and Future,"* 24 SUFFOLK U. L. REV. 601, 604 (Sept. 1990). The decision of the three-judge District Court was issued less than one month later on June 17, 1970. *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *aff'd in part, rev'd in part*, 410 U.S. 113 (1973). Appeals to this Court were promptly taken by both sides, although both sides also filed protective appeals to the United States Court of Appeals for the Fifth Circuit. *See Roe*, 410 U.S. at 122.

[15] *See, e.g.*, Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 37 (1978) (noting that the medical and scientific information introduced in *Roe* and *Doe* was presented for the first time at the Supreme Court level).

[16] Justice Blackmun later explained that he personally conducted much of the research for the *Roe* opinion at the Mayo Clinic library:

> I traced down, as I hoped to be able to do, the attitudes toward abortion of the American Medical Association (it had changed over the years), of the American Public Health Association, and of the American Bar Association. I wished, furthermore, to study the history of our state abortion statutes, and I wished to ascertain the origin and extent of acceptance of the Hippocratic Oath. That research, personally and very privately performed, was, I believe, rewarding.

Justice Harry Blackmun, *Remarks Before the Franco-American Colloquium on Human Rights* 14-15 (1979) (transcript available in the

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respect, Petitioner's Rule 60(b) motion seeks to permit the development of the full factual record that should have been developed in the original litigation of this matter.[17]

The voluminous evidence that Petitioner proffered to the District Court demonstrates that these material facts and factual understandings have significantly changed since this Court issued its decision in *Roe* in 1973, and indeed even since the subsequent decisions in *Planned Parenthood v. Casey* and in *Stenberg v. Carhart*, 530 U.S. 914 (2000). Yet the District Court neither held an evidentiary hearing, nor considered any of this evidence, finding that Rule 60(b)(5) did not permit any relief after the passage of so many years.[18] The District Court's failure to hold a hearing or consider this evidence is itself a denial of constitutional due process.[19] Further, the District Court's treatment of Rule 60(b)(5) is inconsistent with this Court's

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Harvard Law School Library), *quoted in* Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717, 723 n.34 (1983). *See also* Lisa R. Hasday, *The Hippocratic Oath As Literary Text: A Dialogue Between Law and Medicine*, 2 YALE J. HEALTH POL'Y, L. & ETHICS 299, 306-09 (March 2002) (describing scholarly criticism of analysis of Hippocratic Oath relied upon in *Roe* majority opinion); John M. Dolan, *Is Physician-Assisted Suicide Possible?*, 35 DUQ. L. REV. 355, 383-85 (Sept. 1996) (same).

[17] *Amicus* expects that, if this Court grants the petition and permits the Rule 60(b) motion to proceed in District Court, substantial evidence will be submitted not only by Petitioner, but also by intervenors and *amici* on both sides of the issue. This will result in the development of an extensive factual record that will greatly aid the District Court, Court of Appeals, and ultimately this Court in carrying out their respective responsibilities under *Casey* and *Agostini*.

[18] *McCorvey v. Hill*, 2003 WL 21448388 (N.D. Tex. June 19, 2003), Pet. App. at 21-25. *Cf. Planned Parenthood v. Casey*, 510 U.S. 1309, 1313-14 (Souter, Circuit Justice 1994) (noting, in denying plaintiffs' application for stay of Court of Appeals' mandate pending petition for *certiorari*, that plaintiffs "had been given a fair opportunity to develop the record in the District Court" where "the original District Court opinion . . . contains 287 detailed findings of fact and carries every indication that the applicants were given broad latitude to introduce evidence, call witnesses, and elicit testimony").

[19] *Cf. Goldberg v. Kelly*, 397 U.S. 254 (1970).

statements that such an effort by a party to seek relief from prospective application of the earlier judgment is a "proper application of Rule 60(b)(5),"[20] particularly where, as here, there has been "a significant change either in factual conditions or in law."[21]

The path that Petitioner has recently followed in evaluating the facts and factual understandings regarding this issue is in many respects similar to the path taken by *amicus* Christian Legal Society. For many years, the Christian Legal Society did not take an official position on the issue of abortion. CLS first formally addressed the issue of abortion in 1968, when its official publication, THE CHRISTIAN LAWYER, published an article that supported the model "Therapeutic Abortion Act" proposed by the American Law Institute ("ALI").[22]

As the article explained, the ALI model act decriminalized abortion in certain narrowly defined circumstances, placing great weight upon the importance of professional medical care and the strong doctor-patient relationship between a pregnant woman and her physician.[23] The ALI proposal "[did] not authorize abortion on demand" but rather recognized that abortion would be justifiable "only before viability" and only in three types of cases: (1) when there is a substantial risk that the continuance of the pregnancy would gravely impair the physical or mental health of the mother; (2) when there is a substantial risk

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[20] *See Agostini v. Felton*, 521 U.S. 203, 238-40 (1997).

[21] *See id.* at 215, *citing Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992) (appropriate to grant a Rule 60(b)(5) motion when the party seeking relief can show "a significant change either in factual conditions or in law").

[22] *See* Thomas F. Lambert, Jr., *Legal Rights of the Fetus*, 1 THE CHRISTIAN LAWYER 23 (Fall 1968) (hereinafter *"Legal Rights of the Fetus"*). This ALI model act had been adopted in some form in fourteen states at the time *Roe* was decided, and was included as Appendix B to the Opinion of the Court in *Roe*'s companion case, *Doe v. Bolton*, 410 U.S. 179, 182, 205-07 (1973).

[23] *See* 1 THE CHRISTIAN LAWYER at 29.

that the child would be born with grave physical or mental defect; and (3) when the pregnancy resulted from rape, incest, or other felonious intercourse.[24]

Based upon the factual information available in 1968, the *Legal Rights of the Fetus* article also spoke of "a mounting consensus in the United States that the traditional abortion law is unnecessarily strict, even Draconian, and should be liberalized." It suggested that "progress may pursue the line of advance of moving first to the ALI position and thereafter as awareness of social and moral claims is enlarged to the [more liberal American College of Obstetricians and Gynecologists] position."[25] Summarily dismissing objections to such abortion proposals as a "parade of imaginary horribles,"[26] the article looked hopefully toward a future where "society will be sympathetic to the broader justifications for abortion."[27]

As CLS and its members continued to explore this difficult issue, they came to an increasing awareness that these bold statements in the *Legal Rights of the Fetus* article were profoundly in error. Accordingly, THE CHRISTIAN LAWYER published in 1971 a series of articles questioning the morality, medical necessity, and common law precedent for such decriminalization of abortion.

Following this Court's 1973 decision in *Roe*, many CLS members grappled with the issue, with a significant majority becoming involved in the pro-life movement. But not until October 1992 did CLS take its first affirmative pro-life position, authorizing its Center for Law and Religious Freedom to undertake legal advocacy on abortion and other sanctity of human life issues. Accordingly, in 1993, the

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[24] *See id.*

[25] *See id.* at 31.

[26] *See id.* at 32 ("It is a parade of imaginary horribles to suppose that the enactment of the ALI's proposal or even the ACOG proposal on justified termination of pregnancy will evoke 'abortion mills and meccas' in any state.").

[27] *See id.*

Center expanded its mission to include defending the sanctity of human life from conception to natural death.

For the Christian Legal Society and many of its members, the Supreme Court's decision did not "resolve . . . the intensely divisive controversy reflected in *Roe*."[28] Rather, *Roe* severely truncated the normal legal process that was proceeding to address the controversial law of abortion in a careful lawyerly manner, and instead constitutionalized the law of abortion based upon a set of facts that are no longer true today (if they ever were).[29] For example, the *Roe* and *Doe* majority opinions assumed that the decision to abort an unborn child would be made in close consultation with a woman's private physician, yet in striking down the Texas and Georgia laws, and rendering the ALI proposal unconstitutional, *Roe* and *Doe* brought about exactly the opposite result.[30]

Amicus submits that the path that CLS and many of its members have followed – that of reevaluating earlier conclusions in light of continued advances and developments in science, medicine, law, and philosophy – is consonant with what this Court acknowledged in *Casey* would support reexamination, and even overruling, of an earlier Supreme Court decision.[31] *Amicus* further submits that this

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[28] *See Casey*, 505 U.S. at 836 (Joint Opinion).

[29] *See, e.g., McCorvey v. Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring) ("But the problem inherent in the Court's decision to constitutionalize abortion policy is that, unless it creates another exception to the mootness doctrine, the Court will never be able to examine its factual assumptions on a record made in court.").

[30] *See McCorvey v. Hill*, 385 F.3d at 851.

[31] *Cf. Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 783 (1986) (Burger, C.J., dissenting) ("I regretfully conclude that some of the concerns of the dissenting Justices in *Roe*, as well as the concerns I expressed in my separate opinion, have now been realized."); *Hill v. Colorado*, 530 U.S. 703, 791 (2000) (Kennedy, J., joined by Rehnquist, C.J., dissenting) ("The Court now strikes at the heart of the reasoned, careful balance I had believed was the basis for the opinion in *Casey*. . . . In a cruel way, the Court today turns its back on that balance. It in effect tells us the moral debate is not so important after all. . . .").

path and process are consistent with applicable principles of *stare decisis* as recognized in *Casey* and other decisions of this Court. *Amicus* respectfully submits that such reexamination in light of significantly changed facts is not only permitted – indeed, required – by the Constitution and Rule 60(b), it is also profoundly wise.[32]

II. THE ADOPTION OF "SAFE HAVEN" LAWS IN FORTY-SIX STATES, PROVIDING PREGNANT WOMEN WITH AN ALTERNATIVE TO UNWANTED MOTHERHOOD, IS ONE SIGNIFICANT CHANGED MATERIAL FACT THAT REQUIRES GRANTING THE PETITION AND ORDERING CONSIDERATION OF PETITIONER'S RULE 60(b) MOTION AND EVIDENCE.

Among the many material facts that have "changed from those which furnished the claimed justifications for the earlier constitutional resolutions"[33] in *Roe v. Wade*, the enactment in forty-six states since 1999 of "Safe Haven" or "Baby Moses" laws is particularly significant. Such laws afford a woman the right to safely relinquish an unwanted newborn child into appropriate care (the "safe haven") while remaining anonymous and without fear of criminal or civil liability.[34]

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[32] "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

[33] *See Casey*, 505 U.S. at 863 (Joint Opinion).

[34] *See* ALA. CODE §26-25-1 (2000); ARIZ. REV. STAT. §13-3623.01 (2001); ARK. CODE ANN. §9-34-202 (2001); CAL. HEALTH & SAFETY CODE §1255.7 (2000); COLO. REV. STAT. §19-3-304.5 (2000); CONN. GEN. STAT. §17a-57 *et seq.* (2000); DEL. CODE ANN. Tit. 16 §907A (2001); FLA. STAT. ANN. §383.50 *et seq.* (2000); GA. CODE ANN. §19-10A-1 *et seq.* (2002); IDAHO CODE §39-8201 *et seq.* (2001); 325 ILL. COMP. STAT. 2/1 *et seq.* (2001); IND. CODE §31-34-2.5-1 *et seq.* (2000); IOWA CODE §233.1 *et seq.* (2001); KAN. STAT. ANN. §38-15,100 (2000); KY. REV. STAT. ANN. §405.075 (2002); LA. CH. CODE art. 1151 (2000); ME. REV. STAT. ANN. Tit. 17-A §553 (2002); MD. CODE ANN. CTS. & JUD. PROC. §5-641 (2002); MASS. GEN. LAWS ch. 119 §39 1/2 (2004); MICH. COMP. LAWS §750.135

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These "Safe Haven" laws provide mechanisms that address the specific harms that the *Roe* majority opinion stated would result from denying a pregnant woman the choice to terminate her pregnancy:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. *Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.*[35]

All of these harms, except the first, arise not from pregnancy *per se* but rather from motherhood and child care. And all of these harms are addressed by the availability of a safe haven mechanism to enable a woman to relinquish an unwanted newborn to a safe haven.

(2000); MINN. STAT. §145.902 (2000); MISS. CODE ANN. §43-15-201 *et seq.* (2001); MO. REV. STAT. §210.950 (2002); MONT. CODE ANN. §40-6-401 *et seq.* (2001); NEV. REV. STAT. §43b.630 (2004); N.H. REV. STAT. ANN. §132-A (2004); N.J. STAT. ANN. §30:4C-15.7 (2004); N.M. STAT. ANN. §24-22-1 *et seq.* (2004); N.Y. PENAL §260.03, N.Y. PENAL §260.15, and N.Y. SOC. SERV. §372-g (2000); N.C. GEN. STAT. §7B-500 (2001); N.D. CENT. CODE §50-25.1-15 (2001); OHIO REV. CODE ANN. §2151.3515 *et seq.* (2001); OKLA. STAT. Tit. 10 §7115.1 (2001); OR. REV. STAT. §418.017 (2001); 13 PA. STAT. ANN. Tit. 23 §6501 *et seq.* (2002); R.I. GEN. LAWS §23-13.1-1 *et seq.* (2001); S.C. CODE ANN. §20-7-85 (2000); S.D. CODIFIED LAWS §25-5A-27 *et seq.* (2001); TENN. CODE ANN. §68-11-255 (2001); TEX. FAM. CODE ANN. §262.301 *et seq.* (1999); UTAH CODE ANN. §62A-4a-801 *et seq.* (2001); VA. CODE ANN. §18.2-371.1 (2004); WASH. REV. CODE §13.34.360 (2002); W. VA. CODE §49-6E-1 *et seq.* (2000); WIS. STAT. ANN. §48.195 (2001); WYO. STAT. ANN. §14-11-101 *et seq.* (2003).

[35] 410 U.S. at 153 (emphasis added). *Cf. Casey*, 505 U.S. at 853 (one view on the abortion issue "is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent.").

These forty-six Safe Haven laws vary substantially from state to state, but all share key elements in common. Two of the most important common elements are: (1) they allow a mother to anonymously relinquish an unharmed infant[36] without fear of prosecution and/or conviction for such action, and (2) they empower the recipient (the safe haven provider) to provide services, such as needed medical attention, to the infant. The primary features of these laws are outlined below.

A. Safe Haven Laws Provide A Reasonable Period Of Time For A Mother To Relinquish An Unwanted Infant To A Safe Haven.

Because relinquishment of the infant is not required immediately upon birth, the mother is afforded time to fully and thoughtfully consider her decision. Fourteen states permit relinquishment of an infant of seventy-two hours of age or less.[37] Other common maximum ages for relinquishment are five days, seven days, and thirty days.[38] At the extreme, one state permits relinquishment of an infant aged ninety days or less, and one state permits

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[36] State Safe Haven laws use varying terms to refer to the relinquished newborn child, including "infant," "baby," "newborn infant," "newborn," and "child." *See, e.g.*, DEL. CODE ANN. Tit. 16 §907A (2001) ("baby"); FLA. STAT. ANN. §383.50 (2000) ("newborn infant"); ME. REV. STAT. ANN. Tit. 17-A §553 (2002) ("child"); MD. CODE ANN. CTS. & JUD. PROC. §5-641 (2002) ("newborn"). In this brief, *amicus* will refer to a relinquished newborn as an "infant."

[37] *See* ALA. CODE §26-25-1 (2000); ARIZ. REV. STAT. §13-3623.01 (2001); CAL. HEALTH & SAFETY CODE §1255.7 (2000); COLO. REV. STAT. §19-3-304.5 (2000); FLA. STAT. ANN. §383.50 (2000); KY. REV. STAT. ANN. §405.075 (2002); MD. CODE ANN. CTS. & JUD. PROC. §5-641 (2002); MICH. COMP. LAWS §712.1 (2000); MINN. STAT. §145.902 (2000); MISS. CODE ANN. §43-15-201 (2001); OHIO REV. CODE ANN. §2151.3516 (2001); TENN. CODE ANN. §68-11-255 (2001); UTAH CODE ANN. §62A-4a-801 (2001); WIS. STAT. ANN. §48.195 (2001).

[38] *See, e.g.*, MO. REV. STAT. §210.950 (2002); OKLA. STAT. Tit. 10 §7115.1 (2001); IDAHO CODE §39-8203 (2001).

relinquishment of an infant less than one year of age.[39] In this way, the state Safe Haven laws allow a reasonable window of time for a mother to relinquish an unwanted child and avoid any perceived burdens of motherhood, as identified by the *Roe* majority.[40]

B. Safe Haven Laws Permit The Mother (And Others) To Relinquish An Unwanted Infant To A Safe Haven.

Safe Haven laws are clearly (and in some cases expressly) intended to relieve the mother of the physical, psychological, and other perceived burdens of caring for an unwanted child. Accordingly, under every existing state Safe Haven law, the mother may relinquish her infant.[41] In some states *only* the mother may relinquish the infant.[42] In all states that allow persons other than the mother to relinquish the infant, either parent may relinquish the infant to a safe haven provider, though some states require that relinquishment be with the approval of the mother.[43] A small minority of states permit any person to relinquish an infant.[44]

C. Minimal Effort Is Needed For The Mother To Place A Newborn Infant With A Safe Haven.

Each state Safe Haven law specifically identifies the entities (the "safe haven") that may receive a relinquished

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[39] N.M. STAT. ANN. §24-22-2 (2004); S.D. CODIFIED LAWS §25-5A-27 (2001).

[40] In addition, some states, such as California, expressly set forth in the Safe Haven statute a process for the mother to reclaim a relinquished infant. *See, e.g.*, CAL. HEALTH & SAFETY CODE §1255.7 (2000) (procedure for relinquishing person to request return of infant relinquished prior to filing of a petition to terminate parental rights).

[41] *See supra* note 34.

[42] *See* GA. CODE ANN. §19-10A-4 (2002); TENN. CODE ANN. §68-11-255(b)(3) (2001).

[43] *See, e.g.*, MD. CODE ANN. CTS. & JUD. PROC. §5-641(a)(2) (2002).

[44] *See, e.g.*, N.J. STAT. ANN. §30:4C-15.7 (2004).

infant. Such safe haven locations and entities are readily accessible to mothers, in many states even more accessible than abortion providers. The most common safe haven designation is a medical service provider, such as a licensed hospital or its staff while on duty, but designees in some states also include law enforcement officers, fire stations, child welfare agencies and even calls to 911. Only the state of New York varies notably, providing generically for an infant to be left with an "appropriate person" or in a "suitable location" with the relinquishing person then required to notify an "appropriate person" of the infant's location.[45] With designated safe havens so readily accessible, minimal burden is placed upon a mother in relinquishing an infant.

D. Immediately Upon Relinquishment To A Safe Haven, The Mother Is Relieved Of Responsibility For An Infant's Care.

Upon relinquishing an infant to a safe haven, the mother is legally relieved of responsibility for the care and protection of the infant and that responsibility is placed upon the safe haven. Many of the statutes state that the safe haven must perform any act necessary to protect the health and safety of the infant.[46] (Such an express duty is in addition to any common law duty that one would owe to an infant in its custody.) However, the majority of states also relieve the safe haven and its employees of any civil or criminal liability for any acts or omissions made in good faith under the state's Safe Haven law.[47] In any event, in no instance does the mother retain any liability with regard to the future care and protection of the child once the child has been relinquished to the safe haven.

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[45] N.Y. PENAL §260.03 (2000).

[46] *See, e.g.*, ALA. CODE §26-25-1(b) (2000); ARK. CODE ANN. §9-34-202(b); COLO. REV. STAT. §19-3-304.5(2)(a) (2000).

[47] *See, e.g.*, GA. CODE ANN. §19-10A-7 (2002); 325 ILL. COMP. STAT. 2/27.

E. The Mother Of A Relinquished Infant May Choose To Remain Anonymous.

The mother of a relinquished infant is under no legal compulsion to identify herself when relinquishing an infant to a safe haven. Virtually every Safe Haven law allows for the person delivering the abandoned infant to remain anonymous, if the person chooses.[48]

These Safe Haven laws provide a mother the opportunity for an extended period of time to consider whether to relinquish an unwanted infant. The available choice of anonymous relinquishment protects a mother's privacy and relieves her of any legal responsibility of maternity, while providing safe care for the unwanted infant under the control of the state. These laws provide mechanisms that address the specific harms that the *Roe* majority opinion believed would result from denying a pregnant woman the choice to terminate her pregnancy.[49] "[G]overnment programs offer

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[48] Only Georgia requires that the delivering person be the mother with "proof of identification *if available*." *See* GA. CODE ANN. §19-10A-1 *et seq.* (2002) (emphasis added).

[49] The only one of these harms that is not directly addressed by the state Safe Haven laws is the first – "[s]pecific and direct harm medically diagnosable even in early pregnancy." *Roe*, 410 U.S. at 153. But this harm arises only if there is an absolute ban on all abortions – the laws invalidated in *Roe* and *Doe*, as well as the ALI model proposal discussed above, all contained exceptions in the event that the pregnancy posed a risk of specific and direct harm to the mother's life.

Similarly, some might object that Safe Haven laws only eliminate the harms of *maternity*, but not of *pregnancy*, as the mother cannot relinquish an infant prior to its birth. As the *Roe* Court recognized, the fundamental right unique to a woman is the relationship between mother and child. The very constitutional interest that the mother has in her maternity or the termination of her maternity – which is the same interest – requires that the mother be in a setting where she is free from coercion and compulsion in determining whether or not to terminate that interest. Justice Blackmun's opinion in *Roe* assumes that the mother can make a fully informed and uncoerced decision to terminate her maternity prior to the birth of her child. But this assumption is inconsistent with other areas of the law. For example, a number of states do not permit a mother to irrevocably commit her

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medical care, social services, and even, through 'Baby Moses' laws in over three-quarters of the states, the option of leaving a newborn directly in the care of the state until it can be adopted."[50]

The enactment of Safe Haven laws in forty-six states (to date) constitutes a significant changed material fact not in existence, or even envisioned, at the time *Roe* was decided in 1973. Indeed, this change has occurred entirely after this Court's subsequent decision in *Casey*, and even in large part after the decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), as the first Safe Haven law was enacted in 1999, and fewer than fourteen were enacted prior to 2001.[51] This changed material fact is one of many that strongly support reconsideration of *Roe* as Petitioner's Rule 60(b) motion requests.

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child to be adopted prior to birth, and recognize a right to withdraw or revoke consent to adoption for a limited time after the child is born, *see, e.g.*, ALA. CODE § 26-10A-13 (2004), recognizing that birth of the child may alter the mother's decision. It may be logical to link pregnancy with maternity as Justice Blackmun did if, as a practical matter, a mother's decision not to terminate her pregnancy creates a high probability that she will be unable to terminate her maternity after the child is born – in other words, if she cannot reasonably be certain that she can relinquish her child if she determines upon birth that she does not want the child. But in a "Safe Haven" legal regime, the mother may always anonymously relinquish her child to a safe haven provider for a reasonable period following birth, and thereby be relieved of any obligations of maternity. Thus, in a "Safe Haven" legal regime, a mother is free of the compulsions associated with maternity.

[50] *McCorvey v. Hill*, 385 F.3d at 850 (Jones, J., concurring) (footnote omitted).

[51] The first "Safe Haven" law was enacted in Texas on June 19, 1999, one year prior to issuance of the *Stenberg* decision in June 2000. The Texas law became effective September 1, 1999. *See generally* TEX. FAM. CODE ANN. §262.301 (1999). More than thirty-two of the forty-six state "Safe Haven" laws currently in effect were enacted after the year 2000. *See supra* note 34.

III. *CASEY* AND *AGOSTINI* PROVIDE THE CONSTITUTIONAL PRINCIPLES PERMITTING THIS COURT TO GRANT THE PETITION AND ORDER THE DISTRICT COURT TO DETERMINE AFTER AN EVIDENTIARY HEARING UNDER RULE 60(b) WHETHER PROSPECTIVE APPLICATION OF *ROE* IS JUST AND EQUITABLE.

This Court's decisions in *Agostini* and in *Casey* provide the critical constitutional principles that permit this Court to grant the petition. First, *Agostini* and *Casey* both articulate the principle that significant changes in the facts or law underlying an earlier constitutional decision of this Court warrant revisiting and even reversing that decision.[52] Second, from *Casey* comes the corollary that such action may be required not only by changes in the facts *per se*, but also by changes in factual understandings, in the way that such facts have come to be seen or understood.[53] Finally, *Agostini* establishes that Rule 60(b)(5) is an appropriate mechanism for a *party* to the earlier decision to seek such reexamination and reversal.[54]

In *Casey*, although presented with none of the compelling medical, scientific, psychological, testimonial and other evidence that Petitioner now seeks to provide, the Court, while reaffirming *Roe*'s "central holding," nevertheless adjusted the requirements of *Roe* and overruled parts of several earlier rulings that had extended *Roe*'s application. Petitioner's Rule 60(b)(5) motion now seeks to submit for consideration by the courts (and ultimately by this

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[52] *See Agostini*, 521 U.S. at 215; *Casey*, 505 U.S. at 854-55, 863 (Joint Opinion). *See also Brown v. Board of Education*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), on basis of, *inter alia*, changes in psychological knowledge).

[53] *See Casey*, 505 U.S. at 854 (Joint Opinion) (overruling earlier constitutional decision warranted where "facts have so changed, *or come to be seen so differently*, as to have robbed the old rule of significant application or justification") (emphasis added).

[54] *See Agostini*, 521 U.S. at 238-40.

Court[55]) precisely what was not considered in *Casey*: "serious and substantial evidence . . . that goes to the heart of the balance *Roe* struck between the choice of a mother and the life of her unborn child."[56] Significant among this evidence is the adoption, subsequent to *Roe* and *Casey* and largely subsequent to *Stenberg*, of state Safe Haven laws that directly address the harms relied upon in *Roe*. Granting *certiorari* will allow this Court the opportunity, missing in *Casey*, to thoroughly and thoughtfully consider the substantial changes in the medical, scientific, psychological, and other facts and factual understandings regarding abortion in America.

Petitioner contends, and *amicus* Christian Legal Society agrees, that these changed facts and factual understandings demonstrate that prospective application of *Roe* is no longer just or equitable. But this Court need not resolve that question to grant *certiorari*. Indeed, this Court may not yet have a sufficient factual record upon which to resolve such a question – as it would if Petitioner were allowed to proceed with her Rule 60(b) motion in the District Court. Consequently, *amicus* respectfully urges this Court to grant the petition, vacate the rulings below, and remand this case to the District Court with instructions to conduct an evidentiary hearing and determine in the first instance whether there are significant changes in the facts and factual understandings underlying the *Roe* decision that make its prospective application unjust or inequitable.

CONCLUSION

For the foregoing reasons, *amicus curiae* Christian Legal Society respectfully urges this Court to grant the petition for a writ of *certiorari*.

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[55] Consistent with *Agostini*, the ultimate determination whether to overrule or modify *Roe* obviously must rest with this Court. *See Agostini*, 521 U.S. at 237-38.

[56] *See McCorvey*, 385 F.3d at 850 (Jones, J., concurring).

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IN THE
Supreme Court of the United States

NORMA MCCORVEY, FORMERLY KNOWN AS JANE ROE,

Petitioner,

v.

WILLIAM "BILL" HILL,
DALLAS COUNTY DISTRICT ATTORNEY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE MAUREEN CURLEY, MS, APRN, BC; MARY DEVINE, MSW, CASAC; FRAN M. BLACK, RN, MSN, CRFNP; AND FELIX J. CALLAN, M.D. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amicus, Maureen L. Curley is an advanced practice psychiatric nurse specializing in perinatal mood disorders with a focus on post abortion psychological stress. She has had extensive clinical experience and practice in the field of psychiatric nursing at various hospitals and clinics throughout the country since 1976. She is an associate clinical faculty member in psychiatric nursing with the University of Massachusetts at Amherst, School of Nursing, and is currently a PhD candidate in nursing with McGill University in Montreal, Canada. Ms. Curley has participated in numerous presentations and lectures in the field of psychiatric nursing particularly with respect to the psychological effects of abortion. She also gave expert testimony pertaining to parental notification of abortion for minors before the Vermont Legislative Health, Welfare and Judicial Committees in 2001 and 2002.

Amicus, Mary Devine is a licensed Masters of Social Work and a certified alcohol substance abuse counselor in New York State. She earned her Masters degree from Fordham University in 1996. Prior to obtaining her Masters, Ms. Devine was a certified Social Worker in New York State since 1989. She is currently a clinical supervisor at NRI, LLC. in New York City, which provides addiction rehabilitation in a twenty eight day program. Specifically, she provides in-house psychotherapy and crisis intervention to

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[1] Counsel for Amici Curiae authored this brief in its entirety in collaboration with John Virdone, Esq. Allen Sullivan, Esq. also assisted in editing the brief. No person or entity, other than the named Amici Curiae, supporters, or counsel, made a monetary contribution to the preparation or submission of this brief. Amici have obtained consent for this brief from all parties. The written consents from all parties have been filed with the Court.

clients, and supervises and trains Masters of Social Work students and other clinical staff.

Amicus, Fran M. Black is a certified family nurse practioner with a focus on woman health. She is licensed in Virginia and Washington D.C. Ms. Black received her Masters in Nursing from Marymount University in Arlington, Virginia in 1996, but has worked as a registered nurse since 1965. Currently, she is employed as a nurse practioner with The World Bank in Washington D.C. In 2002, Ms. Black was invited and participated in the "Cardiovascular Health for Women Invitational Conference," at Johns Hopkins Nursing School in Baltimore, Maryland. She is a member of the American Academy of Nurse Practioners and the Virginia Council of Nurse Practioners.

Amicus, Felix J. Callan, is a retired Orthropedic surgeon. He earned his medical degree from Yale University School of Medicine in 1956. Dr. Callan conducted is medical internship at the Minneapolis General Hospital from 1956-1957 and general surgical residency at Darthmouth Medical Center from 1957-1958. In addition, Dr. Callan practiced at Scott Air Force Base Regional Orthropedic Referral Hospital in Bellville, Illinois while serving in the U.S. Air Force with a rank of Captain from 1958-1963. Thereafter, he practiced orthropedic surgery at Danbury Hospital, Danbury Connecticut from 1963-1973 and Central Vermont Hospital, Berlin, Vermont from 1974-2000. He is a diplomate of the American Board of Orthopedic Surgeons and a member of the Vermont State Medical Society.

This case addresses the continuing validity of *Roe v. Wade*[2], and its progeny. Amici are concerned about the serious adverse psychological affects of abortion, particularly

[2] 410 U.S. 113 (1973)

on adolescents and university students. Ms. Curley's extensive clinical practice, teaching and research in the area of perinatal and post abortion stress disorders commenced in 1976. This experience renders her exceptionally qualified to make a determination, based on compelling evidence, that abortion is dangerous for the short and long term psychological health of women, particularly for younger and psychologically vulnerable women. In her clinical practice and research, Ms. Curley found a direct correlation between women who have a history of induced voluntary abortions and a higher risk of suicide, self-destructive behaviors (i.e. promiscuity, substance abuse, alcoholism and a history of failed relationships) and stress disorders. She reports that younger women who have abortions are the most vulnerable to psychiatric morbidity and mortality. Ms. Curley notes that the dynamics of abortion perpetuates the problem because the supply of abortion creates the demand for abortion. Therefore, she concludes that the most effective method or the strongest deterrent to reducing the incidence of psychiatric morbidity and mortality associated with abortion is to make abortion unavailable altogether.

SUMMARY OF ARGUMENTS

1. New and compelling evidence, gathered since *Roe v. Wade* and its progeny were decided, demonstrates that abortion is dangerous for the short and long term psychological health of women generally, and particularly among younger and more vulnerable women.

2. Based on this new evidence, the State has a compelling interest to exercise its police powers and proscribe abortion in order to preserve and protect the psychological health of women.

3. The fundamental 'right to privacy' is not absolute and is currently subject to proscription in certain other circumstances (i.e. narcotics use, prostitution, polygamy.) State laws proscribing such illegal activities are valid and are narrowly tailored to achieve the State's legitimate interest in protecting the public health and welfare. Similarly, the State of Texas penal laws proscribing abortion activities are narrowly tailored to achieve the State's legitimate interest in preserving and protecting the psychological health of women.

4. Based on the foregoing, the Court should grant certiorari, to consider whether *Roe v Wade*, and its progeny are in fact sustainable in the face of this new and compelling evidence that abortion is dangerous for the short and long term psychological health of women.

ARGUMENTS

I.

CERTIORARI IS WARRANTED BECAUSE NEW EMPIRICAL EVIDENCE GATHERED SINCE ROE V. WADE PROVES THAT ABORTION ADVERSELY EFFECTS WOMEN'S PSYCHOLOGICAL HEALTH

Maureen Curley, ("Curley") in her paper, *"The Impact of Abortion on the Public Health and Welfare."(2004)*[3] reports her findings that abortion is unsafe for the psychological health of women. She concludes that the 'strongest deterrent' to post-abortion psychological disorders is to make it unavailable altogether.

Curley's paper cites mounting new empirical evidence linking a history of induced abortion with high rates of psychiatric morbidity and mortality.[4] She cites various psychological studies conducted over the last ten years showing that suicide rates for women who have abortions are three times higher than the rate for women in general.[5] She also reports that with regard to women's mental health, epidemiological data[6] "suggests [that] abortion is

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[3] A copy of Amicus' paper is annexed to this brief.

[4] *Id* at 3

[5] *Id* at.4

[6] Epidemiological data refers to a higher quality of study and evidence than was done before for the abortion aftermath. Epidemiological studies use large sample sizes, with objective versus subjective measures, and use medical records that clearly link a history of abortion with a history of suicide, death etc. Therefore, these results are not subject to interpretation or dispute and are more reliable than expert opinion. *Id* at 3-4.

significantly less safe than previously thought and actually life threatening for women."[7]

Curley also reports that these studies are supported by data showing an increased incidence of women worldwide seeking services for post-abortion psychological distress.[8] Curley observed that because health care professionals have not traditionally recognized the psychological distress effects of abortion, there has been a proliferation of post abortion support groups, websites and self-help resources. Therefore, Curley finds post abortive women are fast becoming a marginalized and under-served population in health care.[9]

The women most affected are those between 20 and 24 years of age who exhibit the highest incidence of psychological distress after abortion.[10] This is significant because women in this age group 1) consistently choose abortion to relieve psychological distress in their lives and 2) have the highest rate of repeat abortions.[11]

Curley has personally treated over one hundred women who have experienced short or long term psychological effects of abortion.[12] The affects include cases of completed suicide, treatment resistant depression, all types of stress disorders, as well as post-partum and ante-partum

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[7] *Id.at 5*

[8] *Id* at 5.

[9] *Id*

[10] *Id* at 6.

[11] *Id*

[12] *Id* at 8.

psychological disorders.[13] Curley states that such clinical data are consistent with the accruing empirical data as well as with the theoretical assertion that abortion induces a psychological stress syndrome for many women.[14] Curley reports that if the conflict is not resolved, post abortion psychological distress will result in a pathological response including repeated pregnancies with repeated abortions.[15]

Curley provides five case examples of the adverse psychological effects of abortion.[16] In two cases, the women, reporting post abortion psychological distress, completed suicide; in another the woman attempted suicide; in two others, the women described becoming promiscuous immediately after their abortion (i.e 100 sexual partners in six years and another 60 partners in 10 years.)[17]

In fact, Curley challenges the pro-choice ideology as "overly simplistic and concrete with no place for women who are distressed over their abortion, regret their abortion or whose reaction may change from one of initial relief to one of distress or dissatisfaction later."[18] In sum, Curley concludes that, when comparing similar populations, younger and more psychologically vulnerable women who give birth demonstrate less adverse short and long-term psychological effects than those who abort. Actually, she states those who

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[13] *Id*

[14] *Id* at 8

[15] *Id* at 9.

[16] *Id* at 9-13.

[17] *Id*

[18] *Id* at 13

deliver are less likely to engage in high-risk behaviors because motherhood acts as a protective factor to vulnerable women who have self-destructive tendencies. Even if the woman does not choose to rear the child, the short and long-term stress associated with aborting a pregnancy outweighs the risk associated with giving birth.[19]

II.

CERTIORARI IS WARRANTED BECAUSE THE RIGHT TO CHOOSE ABORTION IS NOT ABSOLUTE AND THE STATE HAS A COMPELLING INTEREST IN PROTECTING WOMEN FROM THE DANGEROUS PSYCHOLOGICAL EFFECTS OF ABORTION

New evidence proves that abortion is harmful to women's psychological health, and therefore, women's right to choose abortion must give way to the State's legitimate interest in preserving and protecting their psychological health. In *Roe* and its progeny, this Court did not consider this new evidence, which demonstrates that abortion is dangerous for women. Therefore, the Court should grant certiorari to consider this new evidence and the affects of abortion on millions of women each year.

The Court's plurality opinion in *Roe* stated that a women's "right to privacy" encompasses a woman's decision whether or not to terminate her pregnancy. In support of its ruling, the Court stated:

> The detriment that the state would impose upon the pregnant women by denying their choice altogether is apparent. Specific and direct harm medically diagnosable even in the early

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[19] *Id* at 14.

> pregnancy may be involved. Maternity, or additional offspring may force upon a women a distressful life or future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned associated with the unwanted child, and there is a problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the women and her responsible physician necessarily will consider.[20]

Accordingly, the *Roe* Court relied on factors relating to psychological harm that it associated with unwanted pregnancies to justify, in part, its decision to uphold a women's right to choose abortion. In addition, the *Roe* Court held that "the State does have an important and legitimate interest in preserving and protecting the health of the pregnant women."[21] However, the Court elaborated that "the 'compelling point,' in light of the present medical knowledge is at approximately the end of the first trimester."[22] At which point, the Court held, "the State may regulate abortion as long as it is reasonably related to the preservation and protection of the maternal health."[23] Nineteen years after *Roe*, the Supreme Court, in a plurality of five Justices,

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[20] *supra* at p 153

[21] *Id* at 162-163.

[22] *Id* [emphasis added]

[23] *Id.*

invalidated *Roe's* trimester framework, but nevertheless, reaffirmed a woman's right to choose to terminate her pregnancy before the time of viability. *See Planned Parenthood of Southeastern Pennsylvania, et. al. v. Casey et. al.*[24] The psychological impact or harm of an unwanted pregnancy on the health of the woman was paramount to both the *Roe* and *Casey* Courts' analysis of a woman's interest in whether or not to choose to terminate her pregnancy. The Court in *Casey* explained:

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.... her suffering is too intimate and personal for the state to insist, without more, upon its own vision of the woman's role...[25]

It also determined that "it can not be questioned that psychological well being is a facet of health."[26] Justice Stevens in his dissent in *Casey* wrote:

> In general *Roe's* requirement that restrictions on abortion before viability be justified by the State's interest in maternal health has prevented states from interjecting regulations designed to influence a woman's decision, thus we have upheld regulations of abortions that are not efforts to sway or direct a women's choice, but rather are efforts to enhance the deliberative

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[24] 505 US 833, 870, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

[25] *Id* at 852. [emphasis added]

[26] *Id* at 882. See also *United States v. Vuitch*, 402 U.S. 62, 72, 91 S.Ct. 1294 (1971)

quality of that decision or are neutral regulations on the health aspects of her decision. [27]

Therefore, there was also wide recognition by most members of the Court that the State does have a legitimate interest in regulating a woman's decision to have an abortion when such interest is neutral and seeks to promote maternal health.

Prior to the *Roe* and *Casey* decisions, in order for the State to legally regulate a fundamental right, this Court required the State's interest to be compelling. Fundamental rights can be regulated if the State's interest is compelling and the enactment is narrowly tailored to achieve the State's interest. See *Reno v. Flores*[28], ("Respondent's substantive due process claim relies upon our line of cases which interprets the fifth and fourteenth Amendment's guarantee of 'due process of law' to include a substantive component, which forbids the government to infringement on fundamental liberty interests at all no matter what process is provided unless the infringement is narrowly tailored to serve a compelling state action."), and *Washington v. Glucksberg*.[29] Therefore, the 'right to privacy' and the abortion decision can be regulated if there is a compelling state interest narrowly tailored to achieve that interest. Even the *Roe* Court stated "the privacy right involved, [therefore], cannot be said to be absolute."[30] Given the Court's holding that the privacy right is not absolute, can the State ever have a sufficiently compelling interest to proscribe the abortion decision

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[27] *Id* at 916.

[28] 507 U.S. 292, 113 S. Ct. 1439, 1447 (1993)

[29] 521 U.S. 702, 721, 117 S.Ct. 225 (1997) citing *Flores*.

[30] *Id* at 154.[emphasis added]

altogether? However, before analysis of the arguments for this position is demonstrated, a review of the *Casey* standard is necessary.

The *Casey* decision fundamentally changed the Court's standard in determining whether the abortion choice prior to viability can be regulated by the State. The *Casey* Court abandoned *Roe's* trimester framework and the 'compelling interest' standard traditionally used in cases involving the alleged deprivation of fundamental rights. In its place, the Court substituted an 'undue burden' standard that now analyzes State regulation prior to the time of viability on whether or not it is a 'substantial obstacle' to the abortion choice. Nevertheless, whether pursuant to the 'compelling interest' standard or the 'undue burden' standard both *Roe* and its progeny as well as *Casey* affirm that the State's interest in promoting maternal health can be sufficiently compelling to justify regulating or even proscribing the abortion choice altogether.

III.

CERTIORARI IS WARRANTED BECAUSE THE STATE'S COMPELLING INTEREST IN PROTECTING WOMEN'S PSYCHOLOGICAL HEALTH MAY INCLUDE PROSCRIBING THE ABORTION CHOICE

This Court should grant certiorari and overturn *Roe v. Wade* because the psychological harm to women who have abortions greatly outweighs any pain, discomfort, suffering, or other psychological harm women may experience in bringing their unwanted pregnancies to full term. This Court has acknowledged that the State has a legitimate interest in preserving and protecting maternal health, which includes their psychological well-being.[31] Recent empirical research and case studies demonstrate that the psychological harm that abortion itself causes women makes the State's interest in proscribing the abortion decision altogether sufficiently compelling. The State's compelling interest in preventing this significantly greater psychological harm to post-abortive women is narrowly drawn and serves the State's legitimate interest. There is no more effective method preventing the overwhelming and dangerous psychological harm caused by abortion other than proscribing the procedure altogether.[32]

Although this Court has previously characterized a woman's choice of terminating her pregnancy as a fundamental right, there are presently many other instances in which a woman's 'right to privacy' is altogether proscribed by the State's police powers in its legitimate

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[31] *Casey* supra at 882.

[32] See generally, Curley, Maureen, *"The Impact of Abortion on Public Health and Safety." (2005)*

interest to protect the public health and welfare. For instance, there has never been a question or any doubt that the State has a legitimate interest in proscribing women's (and men's) use of certain narcotics, or participation in activities such as prostitution or polygamy. See *United States v. Oakland Cannabis Buyer's Cooperative*,[33] (Supreme Court upheld federal statute prohibiting the manufacture, distribution and use of marijuana except for government-approved research projects. The Court held that the statute reflects a determination that marijuana has no medical benefits worthy of an exception.) In *State of Minnesota ex rel Whipple v. Martinson*,[34] the Court held :

> There can be no question of the authority of the state in the exercise of its police powers to regulate the administration, sale, prescription and use of dangerous and habit forming drugs such as are named in the statute. The right to exercise this power is so manifest in the interest of the public health and welfare that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called into question.

Further, it has been our constitutional tradition to proscribe suicide and assisted suicide. See *Glucksberg*,[35] (Supreme Court upheld State's reasonable interest in prohibiting assisted suicide. The Court indicated that the State's interest in proscribing suicide and assisted suicide were part of a long historical tradition.) Also, Curley points to the fact that the

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[33] 532 U.S. 483, 121 S.Ct. 1711 (2001)

[34] 256 U.S. 41, 45, 41 S.Ct. 425 (1921)

[35] supra at 710-719

States already prohibit certain pharmaceutical agents that incur death or inflict injury on the same level or extent that it is now known that abortion does.[36] She indicates that the removal of Vioxx from the market due to cardiovascular risks, and the prohibition of most antidepressant use in children are recent examples of effective blanket restrictions, imposed by the State, to promote public health and safety.[37] Obviously, all of these proscribed activities involve personal matters regarding the use and control of one's own body. In this case, the State's compelling interest in proscribing abortion is narrowly tailored to prevent the greater psychological harm that the procedure causes women.

The State's legitimate interest in proscribing abortion is sufficiently compelling to overcome the 'undue burden' standard pronounced in *Casey.* In that decision, the Court stated:

> *Roe v. Wade* was express in its recognition of the state's important and legitimate interest in preserving and protecting the health of the pregnant woman [and] in protecting the potentiality of human life.[38]

In addition the *Casey* Court also stated: "In our view the undue burden standard is the appropriate means of reconciling the State's interest with the women's constitutionally protected liberty."[39] The Court defined the 'undue burden' standard as follows:

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[36] Curley, supra at 15

[37] *Id.*

[38] *Casey*, supra at 876 citing *Roe* at 162.

[39] *Id* at 876.

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a women seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the state in the interest in the potential life must be calculated to inform the women's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.[40]

The *Casey* Court's application of the 'undue burden' standard would, at first glance, seem to indicate that a woman's right to choose to abort a nonviable fetus could never, even for the most compelling reasons, be proscribed. Such a restrictive interpretation of the holding in that decision could not be correct as it would be inconsistent with traditional due process jurisprudence. Even the *Roe* Court acknowledged that "the privacy right involved, [therefore], cannot be said to be absolute."[41] Certainly, a woman's privacy right could not be absolute if it conflicted with another person's fundamental right. See *Burson v. Freeman*,[42] (Supreme Court upheld State's 'compelling interest' in forbidding the fundamental right to political speech within 100 yards of a polling place in order to protect the fundamental 'right to vote' from fraud and undue

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[40] *Casey* at 877.

[41] *Id* at 154. [emphasis added]

[42] 504 US 191, 211, 112 S.Ct. 1846 (1992)

influence, which were in conflict.) For example, the *Roe* Court acknowledged that, if the "personhood [of the fetus] is established, the appellant's case, of course, collapses, for the fetus 'right to life' would then be guaranteed specifically by the amendment."[43] Therefore, since it is not possible for the privacy right to be absolute, even pursuant to the 'undue burden' standard, a sufficiently compelling State interest to protect another person's fundamental right could require that the abortion choice be proscribed altogether.

In addition, even pursuant to the 'undue burden' test, in this matter, there is a sufficient compelling State interest to proscribe the abortion decision altogether because of the significantly greater detrimental and even lethal psychological consequences to women caused by abortion. Curley strongly asserts that the psychological harm caused by abortion greatly outweighs the psychological harm that may be caused in bringing an unwanted pregnancy to full term.[44] She holds that just as the State's prohibition of Vioxx from the public and antidepressant use in children is effective and legitimate, the most effective way to preserve and protect the psychological health of women from the detrimental and lethal affects of abortion is to bar the procedure.[45] Given the now known dangerous effects of abortion on women's psychological health, the State's compelling interest in proscribing the abortion choice altogether cannot be considered unconstitutional or a 'substantial obstacle' to a woman's 'right to privacy,' any more than the State's prohibition of prostitution, the use of narcotics, Vioxx, and antidepressant use in children is a 'substantial obstacle' to

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[43] supra at 156-157.[emphasis added]

[44] *Curley, supra* at 14

[45] *Id* at 15

the privacy right of a person to engage in such injurious activities.

CONCLUSION

Based on the forgoing arguments, this Court should grant certiorari to consider recently emerged empirical evidence, demonstrating that abortion is dangerous for women, to determine whether it should vacate *Roe v. Wade* and its progeny, and to provide any other relief this Court deems just and proper.

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APPENDIX

THE IMPACT OF ABORTION ON PUBLIC HEALTH AND SAFETY

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Introduction

Post abortion psychological distress is becoming a new public health problem (Speckhard and Rue 1992). Increasing evidence associates a history of abortion with higher rates of mortality (Gissler, Berg, Bouvier-Colle & Buekens 2004), suicide (Gissler, Hemminki, & Lonnqvist 1996), self-destructive behaviors (Houston and Jacobson 1996), and stress disorders among women who experience induced voluntary abortion. Until recently, abortion was indicated to relieve the psychological distress imposed by an unwanted pregnancy. Now, several alarming and independent trends are converging to shift the abortion paradigm from promoting psychological health to promoting psychological harm for women. Of significance, is that younger women and vulnerable women have the highest risk for psychiatric mortality and morbidity after abortion. This is of particular concern as younger women are the population having most abortions.

New Evidence for Post Abortion Psychological Distress

The first and most signficant trend is that, in an era of evidence based healthcare, compelling evidence linking a history of induced voluntary abortion with unacceptabley high rates of psychiatric morbidity and mortality is mounting. A developing body of knowledge points to the detrimental effects of abortion on women from a global perspective. Case reports, descriptive studies, and most recently epidemiological studies accumulate as empirical evidence of post abortion psychological distress increases according to levels of knowledge development (Brink & Wood 1998). See Table 1. Studies Identifying Post Abortion Psychological Stress. While early studies assessing the psychological safety of abortion were limited by methodological gaps (Rue, Speckhard, Rogers, and Franz 1989), recent epidemiological

studies correct for these gaps. Epidemiological studies use large population-based samples with data from several thousand to several hundred thousand women. In addition, epidemiolgical studies collect data from medical records rather than patient self-report. This eliminates the methodological problems of patient non-disclosure of abortion as well as high patient drop-out rates which were common in earlier post-abortion research. These methodlogical gaps resulted in underestimating the adverse outcomes of abortion. Moreover, epidemiological studies use clear patient outcome measures such as suicide, psychiatric admission, or psychiatric service utilization that are not subject to researcher bias. Finally, epidemiological studies compare women who have had abortions to women who deliver as well as women in the general population. These comparison groups more accurately assess the impact of abortion within similar reproductive populations (Ney and Wickett 1989)..

Key studies find striking results for high rates of psychiatric mortality and morbidity among women who have abortions. For example, in one study, Gissler and colleagues (2004) found that women who have abortions have a three times higher mortality rate (83.1 deaths per 100,000 women vs. 28.2 deaths per 100,000 women) when compared to women who deliver among a sample of Finnish women. In a similar study, Gissler, Hemminki, and Lonnqvist (1996) found a six-times higher suicide rate for women who have abortions when compared to women who deliver (34.7 suicides per 100,000 women vs. 5.9 suicides per 100,000 women) and an almost two-times higher suicide rate for women who have abortions when compared to women who miscarry (34.7 suicides per 100,000 women vs. 18.1 suicides per 100,000 women). They also found a three times higher suicide rate for women who have abortions when compared to the suicide rate for women in the general population. This

latter finding was replicated by Morgan and colleagues (1997) who similarly found a three times higher suicide rate for 408,000 women thirty days after abortion as compared to before abortion. The authors conclude that there may be an increased risk for suicide after abortion. In another study exposing the impact of abortion on psychiatric morbidity, Reardon and colleagues (2003) analyzed over 56, 000 health records from a sample of low-income women in California. They compared psychiatric hospitalization admission rates three months after pregnancy outcome for women who have abortions to women who deliver and women in the general population. Results showed that women who have abortions had a 2.6 times higher rate of psychiatric admission than do women who deliver. Among age groups, women ages 20 to 24 years were found to have the highest psychiatric admission rate. These results are consistent with most studies that conclude younger women are the most adversely affected by abortion.

The results of these studies are alarming for several reasons. First, all studies point to the fact that abortion either directly or indirectly contributes to death or severe psychological injury shortly after abortion for a representative sample of women worldwide. Second, studies that analyze results by age group note a higher rate of death or injury for women between the ages of 20 to 24 years. This is significant as women between the ages of 20 to 24 years have the highest incidence of abortions worldwide. In addition, these data provide the strongest level of evidence to date on the psychiatric aftermath of abortion. This stands in stark contrast to early conclusions concerning the safety of abortion. Surprisingly, many of these conclusions which shaped abortion policy in the United States, are based on expert opinion rather than emprical data. According to the Cochrane Collaboration on Systematic Reviews, considered by some to provide the gold standard for evidenced-based

healthcare, expert opinion is often based on bias rather than scientific merit. Stotland (2004) illlustrates the influence of bias-based expert opinion over science in a recent testimony in support of the safety of abortion before a hearing of the United States Senate Sub-Committee on Commerce, Science Technology, and Space on the Impact of Abortion on Women's Health. Surprisingly, Stotland reported none of these new scientific data. Moreover, these data suggesting abortion is less safe than birth refute early data that promoted legalization suggesting abortion is safer than childbirth. Of further concern is that, these data suggest abortion is not only markedly less safe than previously thought , but actually life-threatening for many women.

Incidence of Post Abortion Psychological Distress

The second trend is an increased incidence of women worldwide seeking services for post abortion psychological distress.The rapid proliferation of international post abortion support groups, web-sites, and self-help resources demonstrates this unmet demand for services. However, due to a lack of dissemination of these research findings, healthcare providers have been slow to recognize post abortion psychological distress. As a result, distressed post aborted women are fast becoming a new marginalized and under-served population in healthcare.

According to United Nations data, approximately 46 million women worldwide between the ages of 15 and 44 years have legal, induced abortions each year (United Nations 2002). Of these, between 30% and 40% are repeat abortions. Rates of abortion vary significantly among age groups. Worldwide abortion rates are the highest for women between the ages of 20 to 24 years. On average the abortion rate for this age group is approximately 35 abortions per 1000 women within developed countries (AGI 1999). The United States exceeds this rate with approximately 53

abortions per 1000 women as compared to 31 per 1000 women in Canada and 37 per 1000 women in Australia. In addition to having the highest incidence of abortion, women between the ages of 20 and 24 years also have the highest incidence of psychological distress after abortion. This is significant as women within this age group consistently choose abortion in order to relieve psychological distress in their lives. Furthermore, women within this age group represent the population that has the highest rate of repeat abortions. Some suggest repeat pregnancy and repeat abortion emerge from the psychological distress associated with abortion where the conflict due to the pregnancy or abortion becomes re-enacted until it is resolved (Speckhard and Rue 1992). The World Health Organization recognizes the problem of repeat abortions particularly for women under twenty five and recommends effective post abortion counseling that target this problem (WHO 2003). However, WHO falls short by limiting intervention to a contraceptive rather than psychological focus thereby unsuccessfully treating the symptom rather than the cause of repetitive abortions and pregnancies.

Many conclude that all complications from abortion are underestimated (Health Canada 2000; Cassidy & Gentiles 2000). Estimates vary considerably ranging from 1% (Major et al 2000), 10% (Coleman 2002; Adler 1989) up to 46% (Mulfel et al 2002) and even 50% (Lodle 1985). Some conclude that at least 10% of women suffer lingering psychological distress from abortion that is severe enough to warrant psychological intervention (Coleman 2002; Adler 1989; Lodle 1985; Ekblad 1955). However, this estimate does not include women who present with a delayed stress response to abortion, women who drop out of studies, or the higher incidence of distress among younger women. Rather, based on clinical practice, and consistent with the accruing evidence, this author estimates that the incidence of severe

psychological dstress after abortion for younger women is well over 50%. For example. two major New England universities reported a 60% and 75% referral rate respectively for mental health services for their students after abortion. Of concern is the fact that 50% of the population having most of the more than one million abortions per year represents a substantial segment of the population who are adversely affected by abortion.in the United States.

Younger women are the most vulnerable for negative post abortion psychological sequelae for several reasons. Younger women are more likely to experience abortion as a severe stressor due the presence of multiple risk factors inherent within their developmental stage as well as the circumstances of the abortion. Risk factors for negative reactions to abortion salient to this age group include younger age, single status, lack of social support (David et al 1981), concealment from significant others (Franz & Reardon 1992), such as parents or healthcare providers, coersion to abort (Williams 2000a), and natural emotional immaturity. Mulfel (2000) described emotional immaturity related to abortion decision-making within younger women as a sense of no limitations, impulsive decision-making, and overly concrete thinking that minimizes how they may feel after abortion. In one of the few studies of abortion in this age group, Wheeler and Austin (2001) studied adolescents with early pregnancy loss including abortion. They conclude that this population can experience significant behavioral impairment if not resolved resulting in psychiatric morbidity, repeat pregnancy (Horowitz 1978), and repeat abortion (Speckhard and Rue 1992). Another factor that contributes to psychological vulnerability for young women after abortion is due to the critical phase of development during the female life span, as the onset of reproductive years. During this formative phase, developmental milestones such as psychosexual development, choice of vocation, life partner,

and the beginning of childbearing may occur. While no longitudinal data exist for determining the effect of abortion across the female lifespan to date, these new studies provide the most reliable evidence that abortion has a profoundly negative effect at a critical time in young women's lives.

While it is not clear why there is a greater demand for post abortion psychological services now, several changes in abortion services over the past decade may explain this phenomena. The first change is the advent of medical abortions, such as the RU-486 or Mifeprex. In contrast to surgical abortions, medical abortions require the woman to be an active agent in the procedure. Formerly, women were shielded from exposure to the embryo. With medical abortions, however, women are required to inspect the embryo in order to ensure a complete abortion. Studies that explore women's reactions to medical abortions report significant and unanticipated distress by many women (Elul, Pearlman, Sorhaindo, Simond, & Westoff 2000; Simonds, Ellerston, Springer, & Winkoff 1998). The second change is among the early cohort of women within the United States who have had abortions since 1973. Women who had abortions at ages 20 to 24 years and later during that time are now up to twenty and thirty years post abortion. After the passage of time, healing, and emotional maturity, many of these women retrospectively give public testimony to their experience of dissatisfaction, regret, and prolonged psychological distress as the result of abortion. Such women spearhead post abortion support and advocacy groups such as Silent No More and Operation Outcry that are gaining international momentum. Finally, after thirty-two years of unrestricted abortion policy, with unlimited access to abortion services on demand through all nine months of pregnancy, a social saturation point may be emerging. Consistent with theories of diffusion of innovation, innovation reaches a plateau after thirty years when a course

of time and segment of the population has been satiated. Similarly, the societal impact of abortion may be reaching a plateau where after more than thirty years, the social, cultural, and long term health risks far outweigh the benefits.

Clinical Cases of Post Abortion Psychological Distress

The third trend is an increased incidence of healthcare professionals who are beginningng to recognize adverse psychological effects of abortion in their clinical work (Hess 2004; Gray & Lassance 2004; Williams 2000b). Similarly, this author has treated over one hundred women who have experienced short-term and long-term adverse psychological effects of abortion including cases of completed suicide, attempted suicide, treatment resistant depression, and all types of psychological stress disorders, as well as postpartum and ante-partum disorders. These clinical data are in tandem with the accruing empirical data as well as the theoretical assertion that abortion induces a psychological stress syndrome for many women. This author is in agreement with others that abortion is psychologically harmful for women. Post abortion psychological distress follows the trajectory of symptom presentation, course, and severity of psychological stress disorders. Types of post abortion psycholgical distress that have been reported in the literature and treated by this author include psychiatric disorders that meet the DSM-IV (APA 2000) criteria for Major Depressive Episodes, Brief Reactive Psychosis, Adjustment Disorders, Acute, Chronic, and Delayed Post traumatic Stress Disorders as well as sub-clinical types of psychological and behavioral impairment.

Most types of post abortion psycholgical distress parallel the pathological phases of a Stress Syndromes as proposed by Horowitz (2000;1974). Horowitz theory of Stress Syndromes forms the theoretical underpinnings for all types of stress disorders within the American Psychiatric Association DSM-IV TR (APA 2000) diagnostic

classfications Horowitz conceptualizes the phases of a stress response include outcry as the traumatic event is unfolding, denial of the reality of the experience alternating with symptoms of intrusive re-living the event, working through the cognitive and affective experience of the event, and then completion. According to Horowitz, stress responses become pathological when the event is particularly intense or prolonged and require psychiatric intervention. In such cases, the stressor exceeds the coping skills and pathological avoidant behaviors result. Pathological avoidance includes depression, suicide, substance abuse, high-risk sexual, and self-destructive behaviors. Often, the event repeats itself because the conflict is never resolved. Moreover, pathological behaviors predispose the person to repeating a similar crisis. Post abortion psychological distress follows the trajectory of a pathological response to the stress of the abortion in both course and severity, including the incidence of repeat pregnancies and repeat abortions. This is particularly true for younger women and vulnerable women. The following cases from the authors' research practice and clinical practice illustrates psychological harm particularly for young women after abortion.

Case 1

As a nurse practitioner with a focus in post abortion psychological distress, this author was invited to educate staff of student health services of several universities within Canada and New England. All universities identified post abortion psychological distress as a problem among students that is unresponsive to either supportive or standard care. All university health centers identified psychological problems after abortion as a problem that required specialized mental health treatment.One health service report referring over 60% of women that have abortions for mental health services afterwards. It is noteworthy that women in Canada, where

there is a less controversial political climate surrounding abortion than in the United States, experience similar degrees of post abortion psychological distress as do women within the United States. These reports challenge the claims by some that the guilt that women experience after abortion is imposed by pro-life. demonstrators outside abortion clinics, as there is markedly less pro-life demonstration at abortion clinics within Canada.

Case 2

Stacy was a 20 year-old critical care nurse with no previous mental health history. The patient reported becoming suicidal and cutting her wrists immediately after her abortion. She contacted the abortion provider and was seen three times in an emergency room for unremitting psychological distress. According to patient report, she was given no mental health referral, no psychotropic medication intervention, and no follow up appointment. She stated that she was informed that the abortion provider could no longer help her. By the time she self-referred for out-patient mental health treatment to this clinician, she required an involuntary commitment to a psychiatric hospital due to active and persistent suicidal gestures.

Suicidal ideation after abortion can emerge as a short-term or long-term adverse response. One woman presented to a psychiatric hospital with post abortion psychosis, anorexia, and suicidal ideation shortly after abortion. The women had no former psychiatric history. During her admission, she was pre-occupied with extreme guilt mixed with paranoid ideation regarding her abortion. She re-compensated on antidepressant treatment, was permitted home on a weekend pass, and subsequently hung herself. Another women in her fifties had an abortion during her adolescence. As the patient began addressing the abortion she became increasingly more

guilt ridden, depressed, isolated, and alcohol abusing The patient self-referred to this author but due to a professional conflict was referred to another provider. In the interim, the patient, who had no history of suicidal gestures, completed a suicide via overdose.

Consistent with their developmental status, younger women experience psychological harm from the stress of an abortion due to their underdeveloped coping skills. While some claim that pre-abortion psycho pathology predicts post-abortion psycho pathology (Stotland 2004), this is not the case for younger women. Younger women with no previous mental health history can become overwhelmed and unable to master the stress of an abortion.

Case 3

I n a post abortion psychological support group, most of the self-referred women were less than 25 years old. None had any previous mental health history. Time since exposure to abortion ranged from several weeks to several years. All women experienced surgical abortions within the first trimester of pregnancy. All women procured abortion to relieve the psychological distress from an unwanted pregnancy and reported persistent psychological distress from weeks to years after the abortion. Several women reported being "surprised' are how badly they felt afterward. Women reported feeling depressed, guilt ridden, highly anxious, and overwhelmed by intrusive re-experiencing of the abortion. Some reported marked discrepance between the expectation of their abortion experience and the reality of their abortion experience. While each woman reported marked relief in the severity of distressing symptoms as a result of group participation, most of the women requested continued individual or group follow up as it was reported that a seven week group was not sufficient to address the severity of distress for some.

Young women report anger at abortion providers and "feminists" that underestimate the severity of their abortion experience..This underestimation may be due to either to unrealistic expectations of the impact of the abortion on the part of the young woman or due to inadequate pre-abortion counseling on the part of providers to prepare her for this impact.

In addition, cases of significant and sudden onset of high risk sexual behavior directly after abortion suggest not only the severity of psychological distress but also the compulsion for repetitive behavior to re-enact a repeat pregnancy or repeat abortion.

Case 4

One women reported becoming promiscuous immediately after an abortion following a first sexual encounter at age twenty four. She reported having over one hundred sexual partners within the following six years until she began addressing the abortion experience. Two others women who aborted after a first sexual encounter at age twenty, reported at least sixty sexual partners within the following ten years. All women experienced a repeat pregnancy and some experienced a repeat abortion.

Vulnerable women are also at high risk to experience adverse psychological responses to abortion. Many women are vulnerable due to a history of early adverse life events, low socio-economic status, pre-morbid psychiatric problems, inadequate access to healthcare services or a combination of these factors. In a rural practice offering post abortion psychological support, women in their late thirties and early forties cited a history of multiple abortions as the etiology to a treatment resistant depression lasting from twenty to thirty years. Of significance, is that these women also experienced abortion at a younger age, during adolescence. In addition to a major and recurrent depressive disorder, these women

presented with a history of substance abuse, especially alcoholism, sexual promiscuity, a history of failed relationships, and multiple abortions. This sub-group presented with chronic and delayed post traumatic stress symptoms associated with their abortions.

This author also notes that spiritual distress is a distinct factor present with the psychological distress after abortion. Spiritual distress is not religiously oriented. It appears that women experience a violation of conscience that is more of a maternal or human rather than religious origin. For example, many women who presented with distress had no religious affiliation nor had practiced any tradition either prior to or after their abortion. Their protracted guilt, remorse, or regret associated with the abortion appeared intrinsic rather than extrinsic. Many women had questions for this author such as: What happens to the baby? Does the baby feel pain? Where do the babies go? Where is my baby? Will God punish me for having an abortion?

Case 5

Similar to the findings by Gissler (1996) and Morgan (1997) for high suicide rates after abortion, within a perinatal mental health practice, this author found approximately 8-10 cases of women who were referred for postpartum depression as the presenting problem but who retrospectively reported a first suicide attempt following several weeks or several months after a first abortion. None of the women had addressed the abortion. Several had experienced multiple suicide attempts. For these women, antepartal depression resulted from the distress associated with an unresolved past abortion that is triggered by the current pregnancy.

Typically, healthcare providers within a specialty practice take an extensive history according to their respective disciplines. Hence, mental health providers do not typically obtain an extensive reproductive history including

the incidence or severityof abortions. Similarly, obstetric and gynecological professionals do not typically obtain an extensive psychiatric history. The absence of a comprehensive history that includes two often non-disclosed (unless directly asked) subjects, such as suicide and abortion, may be another reason why many health care providers have not made this association.

A Bio-psycho-social Paradigm

A socio-political paradigm (Andropolous 2000) dominates the abortion issue. The pro-choice ideology is overly simplistic and concrete with no place for women who are distressed over their abortion, regret their abortion, or whose reactions may change from one of initial relief to one of severe psycholgical distress, or dissatisfaction later. This limited framework is another barrier that has prevented healthcare profesionals from identifying negative abortion outcomes. Moreover, the socio-political paradigm of abortion has limited scholarly inquiry into the full range of women's actual responses to abortion, the impact of abortion across phases of the life span, and abortion experiences among diverse populations. This is a real disservice to women. In the wake of this new and methodologically sound data on the impact of abortin on health, healthcare professionals have an ethical obligation to adequately inform, identify, treat, and prevent adverse abortion outcomes. Likewise, policy makers have an ethical obligation to protect public health, welfare, and safety.

A biopsychosocial paradigm that is oriented toward health and illness consistent with the rest of healthcare provides a more accurate framework to assess the full range of response to abortion and more accurately measures "health" which is central to the Roe argument..New evidence refutes the idea that abortion is a stress reliever for women. Instead, abortion as a type of psychological stressor (Rue &

Speckhard 1992) provides the most consistent framework to understand psychological distress after abortion. Stress responses emerge over a continuum of time from immediate, delayed, and chronic and over a spectrum of severity from absent to severe. It should be noted that absent responses to abortion typically include avoidance, denial, or a delayed reaction of psycholgical distress. Women who have abortions at a younger age and vulnerable women represent populations that experience abortion the most severely at all points on the continuum. Moreover, younger womens are those most likely to experience avoidance, denial, or delayed reactions to abortion. Unfortunately, this pathological pattern of what appears to be "no response" by so many has inaccurately been interpreted as normal or "benign" (Adler 2000).

Conclusion

In conclusion, it is becoming increasingly evident that whereas previously younger and more vulnerable populations were considered the most at risk for adverse psychological consequences if abortion was *denied,* this author has observed and empirical data support, that because of these vulnerabilities, younger and vulnerable women are *paradoxically the most adversely affected by abortion.* Women who present with a psychological or biological vulnerability may actually exacerbate this risk by aborting. This is significant because younger and vulnerable women are the population having abortions. In contrast, this author concludes that when comparing similar populations, younger and more vulnerable women who deliver demonstrate less adverse short-term and long-term psychological effects than those who abort. Moreover, those who deliver are less likely to engage in high-risk behaviors as motherhood acts as a protective factor to vulnerable women who may be at risk for self-destructive tendencies. Even if the women does not

choose to rear the child, the short-term and long-term stress associated with aborting a pregnancy far outweigh the risks associated with delivering a pregnancy. This evidence challenges the original argument posed by Roe vs. Wade that suggested "distress associated with additional offspring may force a distressful life and future". The Roe argument incorrectly compared the psychological risks of aborting with the psychological risks of child rearing. Rather, the psychological risks associated with the event of aborting need to be compared with the psychological risks associated with the event of delivering. Compelling evidence now conclude that the abortion procedure is unsafe. As such, making abortion unavailable will be the strongest deterrent to reducing the incidence of psychiatric morbidity and mortality associated with abortion. Some may consider alternative deterrents such as restrictions to abortion, closer monitoring after abortion, or mandatory reporting of adverse events associated with abortion in order to reduce abortion related mortality. However, similar safeguards to protect the public health need to be imposed for abortion as are imposed to protect the public health from other threats to health and safety. For example, pharmaceutical
agents that incur death or inflict injury to the extent that it is now known abortion does, are made unavailable despite public outcry. Often, once the public is made aware of these threats, public acceptance follows, and demand decreases. The elimination of smoking in public facilities, the removal of Vioxx from the market due to cardiovascular risks, and prohibition of most antidepressant use in children are recent examples of effective blanket
restrictions to promote public health and safety.

Moreover, as many women attest, the unlimited access to abortion results in pregnancies that never would have otherwise occurred. In sum, the supply of abortions creates the demand. for abortions. Thus making abortion

unavailable will not only reduce abortion related mortality and morbidity but denying legal access to abortion will reduce the incidence of abortions, as well as reduce the incidence of unwanted pregnancies. It is in the interest of public safety and welfare for the United States judicial system to take a pro-active stand.

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Appendix I Table I

STUDIES IDENTIFYING POST-ABORTION

PSYCHOLOGICAL STRESS

Table 1

STUDIES IDENTIFYING POST-ABORTION STRESS ACCORDING TO LEVELS OF KNOWLEDGE DEVELOPMENT

DATE	AUTHOR	SAMPLE SIZE	DESIGN/METHOD	TIME SINCE ABORTION FOR THOSE WHO IDENTIFIED IT	INSTRUMENT USED	OUTCOME/ CONCLUSION
LEVEL I 2004	Rue, et al	N = 548 Russian and American women	Retrospective, descriptive, cross cultural	6-10 years	Traumatic Stress Institute Belief Scale (TSI)	79% met full or partial PTSD symptoms with international sample. Found adverse life events predict high stress response.
2002	Mufel, et al	N = 150 women	Retrospective interview	6-10 years	IOE	46% reported PTSD symp-toms.

2000	Major, et al	N = 442 women	Prospective Study	1 hour pre-abortion up to 2 years post-abortion	DIS, PTSD standard measure	20% reported depressed mood and negative emotion increased over time. Identified younger age as risk factor. 1% reported PTSD.
1998	Simonds, et al	N = 27 women experiencing me-dical abortion du-ring US clinical trials 1994-1995	Prospective study, in depth interviewing			Reports some "strong, unexpected and traumatic reactions" in encountering embryo.
1998	Miller	N = 45 women post-abortion during clinical trials 1994-1995	Prospective study, telephone interview and self-report	Pre-abortion two weeks and post-abortion six weeks		Found unexpectedly high stress response at 2 weeks. Conclude that response can worsen over time.

Table 1: Studies Identifying Post-Abortion Stress According to Levels of Knowledge Development (continued)

DATE	AUTHOR	SAMPLE SIZE	DESIGN/METHOD	TIME SINCE ABORTION FOR THOSE WHO IDENTIFIED IT	INSTRUMENT USED	OUTCOME/ CONCLUSION
LEVEL I (Cont'd) 1994	Bagarozzi	N = 18 women	Case studies		Family relation-ship history inter-view, Mosher Guilt Inventory, sex history inter-view.	Identify abortion as single traumatic event, Category III Post-Traumatic Stress Disorder, indicating de-layed response and mas-sive denial of abortion and trauma.
1994	JoAnn Angelo	N = 9	Case studies from outpatient clinic			Post-abortion grief, pa-thological grief and cases of Post-Traumatic Stress Disorder.

1993	Erickson					Described model of post-abortion and development of PTSD. Post-abortion as traumatic stressor, empha-size role of aggressor.
1990	Barnard	N = 80 out of 984 women completed study	Prospective study	Time of abortion to 3-5 years later	IOE as well as MCMI	Symptoms of PTSD. 20% reported high stress reaction. Author also con-cluded that risk factors include negative relation-ship with mother, history of past emotional problems conflicted relationship with aborted child.

Table 1: Studies Identifying Post-Abortion Stress According to Levels of Knowledge Development (continued)

LEVEL I (Cont'd) 1987	Reardon	N = 252 self-selected, high distressed wo-men after abortion	Descriptive study in-cluding 42 states in US	3 years	Survey/Question-naire	94% reported negative symptoms, 62% report PTSD.
1987	Speckhard	N = 30 self-selected high distressed women after abortion	Retrospective, des-criptive study, struc-tured clinical inter-view	5-10 years elapsed since abortion	SCID	55% recorded suicide thoughts and 31% reported suicide attempt.
1984	Cohen and Roth	N = 55 women	Prospective study	Obtained pre-abortion and 5-hour post-abortion measures.	IOE	Generalized abortion re-sponse syndrome. Avoid-ers experienced greater distress than non-avoiders.

1983	Congleton & Calhoun	N = 25 women self-selected for emotional distress after abortion. Mean age of sample: 22	Retrospective inter-view, self-report	IOE, approximately 12 years since abortions		Those who reported distress recorded greater religiosity than those who did not report distress. Qualitative themes emerged such as ambi-valence prior to abortion in distressed group. Dis-tressed group reported feelings of depression or denial of abortion ex-perience as well as desire for replacement of fetus.

Table 1: Studies Identifying Post-Abortion Stress According to Levels of Knowledge Development (continued)

DATE	AUTHOR	SAMPLE SIZE	DESIGN/METHOD	TIME SINCE ABORTION FOR THOSE WHO IDENTIFIED IT	INSTRUMENT USED	OUTCOME/ CONCLUSION
LEVEL II 2005	Cougle, J. et al	N =1033, Ages 15-44 Representative Sample of first pregnancy aborted	National of Survey of Family Growth Epidemiological Cohort	10 years	DSM-IV, GAD criteria	Results show a higher rate of GAD among aborting vs. delivering women.
2003	Reardon, et al	N = 56,741 medical record	Epidemiological, compare psychiatric admission rates for abortion vs. controls.	90 days, 180 days, 2 yrs. and 4 yrs.		Abortion group had 2.6 higher admission rate than delivery group at 90 days. Abortion group had higher rates in all other time frames.

2002	Reardon, et al	N=4,463 women National Longitudinal Study of Youth	Prospective study.		CES-D	Married women who aborted were more likely to be at high risk for depression compared to those who delivered.
2002	Coleman, et al	N=55,000 women with 14,297 in post-abortion group and 40,122 in post-birth group.	Retrospective record- based comparison study of birth vs. post-abortion.			First time outpatient mental health treatment. 90 days after pregnancy, post-abortion group had 63% more outpatient claims than birth group.

Table 1: Studies Identifying Post-Abortion Stress According to Levels of Knowledge Development (continued)

DATE	AUTHOR	SAMPLE SIZE	DESIGN/METHOD	TIME SINCE ABORTION FOR THOSE WHO IDENTIFIED IT	INSTRUMENT USED	OUTCOME/ CONCLUSION
1997	Morgan, et al	N = 408,000 records 1991-1995	Retrospective MR linkage comparing post-abortion, post-miscarriage and post-natal group			2X incidence of suicide rate for post-abortive women vs. post-natal women. Authors conclude that decline worsened mental health may be side effect of abortion with more than 2X as likely rate of committing suicide.

1996	Gissler, et al	N = 9000 Finnish mater-nal death rec-ords	Epidemiological; compared suicide rate for birth, abortion or miscar-riage outcome	1 year post-pregnancy outcome		Results show 5.9 times higher suicide rate of post-abortion group vs. post-partum group and 3 times higher suicide rate than general population.
1981	David, et al	N = 71,378 Danish medical records	Epidemiological; compared psychia-tric admission rates of abortion and birth vs. controls	90 days after birth outcome		Found 18.4 per 10,000 women vs. 12 per 10,000 women higher psychiatric admission for abortion.

(10)

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In The

Supreme Court of the United States

NORMA McCORVEY,
FORMERLY KNOWN AS JANE ROE,

Petitioner,

v.

BILL HILL,
Dallas County District Attorney,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF FETAL PAIN AMICI CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF THE AMICI CURIAE

Amici Curiae have a substantial interest in the disposition of this case. The author and editor, have a substantial interest in this case and are requesting this Honorable Court reconsider *Roe v. Wade* in the interest of women. The undersigned make this request because of factual and legal changes in the scientific certainty now concerning the viability and humanity of the fetus, the evidence of excruciating fetal pain, and the resultant psychological damage to women who, without informed consent, terminate the lives of their fetuses. This amici curiae brief is submitted in support of the Petitioner. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

The abstract is written and edited by the Suzanne Besser, BS and Dr. Lucinda Harman, RN, MA, Ph.D., and attached in its entirety as Appendix A.

Suzanne Besser has spent the last 20 years researching, writing and speaking on topics concerning prenatal children, their parents, families, and neighbors. Her work focuses on depolarizing methods, thorough research, and close scrutiny of medical and scientific sources for bias and validity. She does not consider her approach "pro life" she considers it "pro information." She has presented to universities, physicians, nurses, scientists, youths, and children across the United States. Her message focuses on the miracle of human life, the unique sensory developmental milestones through which every person passes during the prenatal period of their lives. She also teaches about the fallacies of the sexual revolution and how one can avoid the hardships they create. In 2003, Suzanne was

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. Counsel of record is applying to the Alliance Defense Fund for reimbursement for expenses printing and copying this brief.

invited to offer comment and recommendation to the State of Texas House Bill 15 "A Woman's Right to Know" workgroup. Two of her suggestions were incorporated into the resulting state mandated document. That same year Suzanne founded Miracle You Ministries as an educational and consulting organization focusing on issues concerning prenatal life and sexual and reproductive integrity. On January 23, 2005 Miracle You Ministries led the Sanctity of Human Life Fair at First Baptist Church in Belton, Texas. Miracle You Ministries is an affiliate of a not-for-profit, evangelical Christian missions organization, Hope for the Hungry. This affiliation affords Miracle You Ministries membership in the Evangelical Financial Accountability Council. Accountability is a theme of Suzanne's work and the ministry she directs.

Ms. Besser has her Bachelors in General Studies and secondary teaching certification from the University of Mary Hardin-Baylor. She has taught middle school learners language arts, speech, and drama and university students' public speaking. Her master's studies are in counseling. Suzanne began researching, writing and speaking on issues involving prenatal children in 1983. She has spoken to physicians and other professional organizations on these issues across the United States and introduced the issue of the prenatal child's ability to experience sensation including pain, to the State of Texas House Bill 15 "A Woman's Right to Know" brochure workgroup. Her work prompted the group's inclusion of two statements, concerning sensation and pain, in their brochure. Dr. Lucinda Harman has her Masters and Ph.D., in Neuro Science from the University of Louisville. She is a registered nurse, has practiced neonatal intensive care nursing, and done research in neonatology. Dr. Harman edited Suzanne Besser's paper on the prenatal child's ability to experience sensation and pain in the fall of 2003.

SUMMARY OF THE ARGUMENT

Casey threw out the "rigid trimester" approach of *Roe,* but the progeny of the two have failed to give sufficient

guidance to state legislatures in that statutes continue to be returned to this court because of the vagueness of that term. *Stenberg* seems to have embraced the trimester formulation again with gestation in a Dilation and Evacuation abortion causing fetal arms and legs being ripped from unborn bodies in the birth canal. It does not take a rocket scientist to envision the horrific pain of a baby ready to be born who is terminated in this manner, but now objective medical evidence documents the fetal pain. Amicus, if this case is granted certiorari, will present evidence of fetal pain in the district court, with fetus as young as 7 weeks gestation responding to stimuli; evidence that was unavailable to the court in 1973. And, neonatal medical evidence that amici will bring before the district court will show that fetus as young as 22 weeks have survived. The ability of the fetus to survive outside the womb was the standard under *Roe,* and *Planned Parenthood of Central Missouri v. Danforth* (No. 74-1151), 428 U.S. 52 (1976), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

In sharp contrast the states have developed all other laws concerning children to require the standard of the best interests of the child, with mandatory appointment of guardians ad litem when the child's interests may be at risk. In every jurisdiction all other state laws concerning children are completely inconsistent with *Roe* which decided the very life of the fetus without a legal representative for the unborn child. This court must grant certiorari in order to consider the factual and legal changes that make *Roe* unconscionable and give guidance to legislature and the lower courts.

Judge Edith H. Jones noted in her concurring opinion below that "[t]he perverse result of the Court's having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter." *McCorvey v. Hill*, No. 03-10711, slip op. at 5 (5th Cir. Sept. 14, 2004).

ARGUMENT

I. THE FIFTH CIRCUIT WRONGLY DECIDED THAT ISSUES RAISED IN *MCCORVEY* WERE MOOT BECAUSE CHANGED FACTUAL CIRCUMSTANCES AND THIS COURT'S RECENT CONSTITUTIONAL DECISIONS HAVE UNDERMINED THE LEGAL FOUNDATIONS OF *ROE*.

A. LATER CASES HAVE UNDERMINED *ROE V. WADE*, 410 U.S. 113, 165, 166 (1973)

When considering a Rule 60(b) motion based on a change in law, the movant's "ability to satisfy the prerequisites of Rule 60(b)(5) hinges on whether [the Court's later] cases have so undermined [the challenged decision] that it is no longer good law." *Agostini v. Felton*, 521 U.S. 203, 217-18 (1997). Specifically, the Court must examine whether the "more recent cases have undermined the assumptions upon with [the challenged decision] relied." *Id.* at 222.

This case presents the Court with a one-of-a-kind opportunity to reconsider *Roe v. Wade*, 410 U.S. 113, 165, 166 (1973) in light of intervening changes in law and fact since 1973. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) at 876 recognized a state interest throughout pregnancy and changed the "rigid trimester" formulation for a standard of viability. *Planned Parenthood of Central MO v. Danforth*, 428 U.S. 52 (1976) at 63 upheld the viability standard and defined it as the age at which a fetus could live outside the womb. *Stenberg v. Carhart* (99-830) 530 U.S. 914 (2000) at 915 allows a 24 week old unborn fetus, a viable infant by any current medical evidence (see Amicus' Argument II) to be destroyed in a partial birth abortion without overruling the viability standard. *Casey* and *Danforth's* recommitment to viability and *Stenberg's* ignoring that standard creates a conflict that is confusing to lower courts and state legislatures. This conflict undermines the challenged decision and negates the Fifth Circuit's decision based on "mootness."

B. THE FACTUAL AND LEGAL LANDSCAPE HAS CHANGED SINCE 1973

The threshold issue to be decided by a Court in evaluating petitioner's motion for relief from judgment under Rule 60(b) is "whether the factual or legal landscape has changed since . . . [the prior ruling of the Court]." *Agostini*, 521 U.S. at 216. Although the court of appeals concluded that Petitioner's motion was timely, it did not reach the merits of the motion because it concluded that the case was moot. *McCorvey*, slip op. at 5. Amicus argues against mootness regarding the ripe issues examining fetal pain and viability given the current confusion after *Stenberg* departed from the viability standard articulated in *Roe*, *Casey*; and *Danforth*. The advances in evidence of fetal pain and viability, unknown at the time of *Roe* and its progeny, and its need to be re-examined under application of *Agostini*; and the cases waiting in the wings on Fetal Pain, Partial Birth Abortion and lawsuits by Abortion Survivors with horrific injuries; and the need for guidance for state legislatures and district courts with the apparent vacuum concerning viability being recognized as originally articulated but apparently, without overruling previous cases, departed from in *Stenberg*.

C. AMICUS FOCUSES ON SUBSTANTIVE ISSUES

The instant brief is focused on the substantive issues ignored by the lower courts when they decided this case on procedural grounds which will be presented to this Court once certiorari is granted. Amicus restates the issues raised on mootness, constitutional federalism and the rational basis standard that have been raised in briefs by other amici, and incorporates them by reference, while specifically focusing on Amicus' concern that the Fifth Circuit decided an important question of federal law that has not been, but should be settled by the Supreme Court, addressing the new factual and legal issues. This case presents substantial issues of national importance. First, as expressed *supra,* whether a vagueness in application of standards of viability as discussed in *Stenberg* needs further clarification to give guidance to state legislatures

and District Courts, given the seeming contradiction with *Casey,* and *Danforth*'s standard of viability. Second, an examination of the latest factual evidence to determine whether the new factual evidence of fetal viability/ humanity and fetal pain has undermined the factual foundations of *Roe*, rendering prospective application of *Roe* unjust. Third, and fourth, whether the Court's decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997), *Vacco, Attorney General of New York v. Quill*, 521 U.S. 793 (1997), *Cruzan by Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) and other developments in constitutional federalism, the new standard of the best interest of the child in all cases involving children in all 50 states, and the mandatory appointment of Guardians ad Litem to represent the interests of the child where abuse is alleged, have undermined the legal foundations of *Roe* rendering prospective application of the judgment unjust. The Court should grant the petition for a writ of certiorari to consider these substantial issues of national importance. This evidence, however, amply justifies relief under Rule 60(b) and the Court should grant the writ of certiorari.

II. THE CURRENT MEDICAL AND SCIENTIFIC UNDERSTANDING OF THE VIABILITY OF THE FETUS AND FETAL PAIN HAS UNDERMINED THE FACTUAL FOUNDATION OF *ROE*.

The following argument incorporates research on the scientific changes in medical knowledge in regard to fetal viability umanity and fetal pain since the decisions of *Roe* and *Ca..ey*. The abstract is written and edited by Suzanne Besser, BS and Dr. Lucinda Harman, RN, MA, Ph.D., and attached in its entirety as Appendix A.

A. *ROE, CASEY, DANFORTH, STENBERG* AND VIABILITY

The unborn child usually lives inside its mother's womb forty weeks. These are called the weeks of gestation. In the past, this gestational period was compared to the process one might find in baking bread. Up until the time that abortion laws became stricter, in the mid 1800s, little

was widely known about the true nature of prenatal development. People thought maybe unborn children went through similar processes as in baking bread. Thus the old adage, "She has a bun in the oven." However, humans do not develop through the combination of ingredients, fermentation, and the change that occurs when heat is applied. Advances in medical, scientific, and technical abilities have changed understanding of whom and what unborn children are. We now know that the time humans spend inside their mother's womb is not some type of changing from one thing into something else through chemical reactions, but rather normal growth and development that begins upon the complete union of the egg and the sperm. Medical research since 1973 documents understanding of fetal pain of the unborn child. *Besser* A2

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) overturned the trimester formulation of *Roe v. Wade*, 410 U.S. 113 (1973) recognizing that the fetus was at least potential human life, even from conception, *Casey* noted, "the trimester framework, however, does not fulfill *Roe*'s own promise that the State has an interest in protecting fetal life or potential life before viability. *Roe* began the contradiction by using the trimester framework to forbid any regulation of abortion designed to advance that interest before viability." *Casey*, at 876. "*Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life *throughout pregnancy*" (emphasis added). *Casey, Id.*

Far from being moot, the issues *McCorvey* will bring before the district court, of fetal pain and viability, are on the cutting edge. In the *Stenberg v. Carhart*, 530 U.S. 914 (2000) decision, the Court appears to ignore *Casey's* determination that the standard was viability (defined by *Planned Parenthood of Central MO v. Danforth*, 428 U.S. 52, 63 (1976) as when a fetus could survive outside the womb). *Stenberg* at 915 authorizes a D & E abortion at 24 weeks, thus authorizing the ripping off of little arms and

legs of a 24 week old unborn child – a viable infant by today's standards of viability, capable of feeling great pain as today's neonatal medical and sentience evidence proves. *Stenberg* ignores the viability standard of *Danforth* and *Casey*, making the issues of the instant case ripe.

The undisputed current medical evidence has changed the factual considerations used under *Roe*. No longer can the court in its wildest imagination return to the comfortable position that the fetus after conception was ever some nonhuman cellular blob. The medical certainty that the fetus is from conception fully human, with all the potential to develop into everything it will ever be, mandates a return by cert to consider the best interests of the fetus using the changed factual evidence now available and applying the same standards developed to protect children, and with a legal representative, a Guardian ad Litem, appointed to speak for the unborn child's rights.

The following are recognized authorities on the humanity/viability that have defined the unborn child since *Roe* was decided in 1973.

The gestational age of viability of the very preterm neonate has steadily progressed downward from 28 weeks in 1973 to 23 weeks in 1998 because of the vast improvement in medical assistance available for the very early preterm neonate. The term "micro-premie" has been coined to describe these 23 to 28 week gestation preterm neonates (Wright, 1998). In a longitudinal study of infants born between May 1988 and September 1991 in one hospital, it was found that 15% of infants born at 23 weeks, 56% born at 24 weeks, and 79% born at 25 weeks survived for at least six months (Allen, et al., 1993). By 1994, infants at 23 to 24 weeks gestation had fair chances of survival and infants at 25 weeks and greater had good chances. In Japan, the Japanese Eugenics Act was amended to place the age at 22 weeks. In 1997 they reported 18% survival rates of micro-premies at 22-23 weeks (Oishi, et al., 1997). At any gestational age, these preterm infants should be provided compassionate care

and pain control (Fetus and Newborn Committee, et al., 1994).

"Human development begins after the union of male and female gametes or germ cells during a process known as fertilization (conception). "Fertilization is a sequence of events that begins with the contact of a sperm (spermatozoon) with a secondary oocyte (ovum) and ends with the fusion of their pronuclei (the haploid nuclei of the sperm and ovum) and the mingling of their chromosomes to form a new cell. This fertilized ovum, known as a zygote, is a large diploid cell that is the beginning, or primordium, of a human being." [Moore, Keith L. Essentials of Human Embryology. Toronto: B.C. Decker Inc., 1988, p. 2]

B. FETAL PAIN AND LAW CONCERNING THE UNBORN

Ms. Besser and Dr. Harmon address the issue of fetal pain as follows:

> 1) Fetal development with respect to pain; 2) Increased sensitivity to pain of preterm infants and unborn children compared to their term counterparts; 3) Effects of maternally administered anesthesia on the fetus with respect to pain management; 4) The age of viability of the unborn child with the advent of new neonatal research and clinical advances; 5) Statistics of abortion and late term abortion; 6) The methodology of abortion throughout the gestational period; 7) Reasons cited for late term abortion; and 8) Anesthesia and analgesia for the unborn child during abortion. A2
>
> The literature with respect to the development of the nervous system in the human unborn child addresses the topic from the perspective of the very preterm neonate as well as the intrauterine studies. According to Dr. Jean Wright's testimony to the U.S. House (1996) and Senate (1998), studies provide insight into the development of the human unborn child in a variety of directions. First, clear indication that the anatomical and physiological (structural and functional) processes that mediate nociception (pain and noxious stimuli) are present in very preterm neonates.

Furthermore, the density of nociceptive nerve endings in the late fetus and newborn infant are at least as dense as in the adult human (Wright, 1996). Sensory perception (response to sensory stimulation) occurs in the unborn child by the 7th week of gestation around the mouth (Richeimer, 2000) and spreads to the entire skin and mucous surfaces by 20 weeks gestation (Wright, 1996). Experiments have demonstrated that this process of sensitivity progresses in the unborn child in the following manner. At just before 8 weeks gestation the unborn child will manifest a set of protective movements to avoid a mere hair stroke on the cheek. This sensitivity extends to the genital area at 10 weeks, the palms of the hands at 11 weeks and the soles of the feet by 12 weeks. By 17 weeks, the abdomen and buttocks are sensitive to this type of stimulation as well as to heat, cold, pressure and pain (Chamberlain, 2003). A2

Additional investigations into the development of the unborn child demonstrate purposeful movement and exploration by the fetus at 10 weeks gestation (Tajani and Ianiruberto, 1990). By 14 weeks, the unborn child demonstrates a complete repertoire of movement including spontaneous, provoked and interactive types therein exploring itself and its environment (deVries, Visser, and Prechtl, 1985). The structures for taste develop at about 14 weeks gestation and the nose with its sensory receptors develops between 11 and 15 weeks. New research indicates that the chemicals that cross the placenta barrier to mix in the amniotic fluid permit the unborn child a range of tastes and smells. This stimulates development of the neurological circuits. Schaal, Orguer, and Rogan (1995) cite evidence for direct and indirect learning of odors including dietary products ingested by the mother. This learning prepares the newborn to respond to various odors with no extrauterine experience for those odors. A2-3

Reactive listening begins at 16 weeks gestation – fully 8 weeks before the external ear has completely developed (Shahidullah and Hepper, 1992). Currently,

it is not possible to assess vision in utero but premature babies from 28 to 34 weeks gestation are able to begin to focus and soon track visual stimuli in both vertical and horizontal directions (Chamberlain, 2003). A3 With this evidence of the development of the neurological circuits for the unborn child in terms of touch (somatosensory), movement (vestibular), pain (nociception), smell (olfactory), taste (gustatory), sound (auditory) and possibly sight (visual), it becomes evident that the unborn child is a sensing being beginning at 7 weeks gestation and progressing to more integrated sensory experiences through 28 weeks gestation. At 20 weeks gestation, twins in utero have no trouble locating each other and touching each other's faces and holding hands (Chamberlain, 2003). A3

Touch develops first and includes pain sensation. The fetus, by the middle week of the gestational period feels touch and pain all over its body. The lack of myelination of the nociceptive neurological tracts does not negate the perception of pain. In fact, the nociceptive impulses in adults can be carried in unmyelinated or thinly myelinated fibers. Additionally, the nerve tracts associated with nociception in the spinal cord (reflex pain fibers) and brain stem are completely myelinated up to the thalamus by 30 weeks gestation. The thalamus is the brain organ that integrates all sensory stimulation except smell and sends signals to the various parts of the cortex for processing. A3

The unborn child's neocortex begins development at 8 weeks gestation and has a full complement of neurons by 20 weeks. The connecting components of cortical neurons (dendrites) proliferate and connections with the thalamus and other portions of the cortex occur. These connections occur between 20 and 24 weeks gestation (Anand, et al., 1987). With this integration in mind, it is not surprising that EEG (brain wave) patterns in preterm babies of less than 28 weeks gestation are present with both visual and auditory evoked potentials demonstrating cortical components, and somatosensory (touch, pain, heat and

cold) evoked potentials were measured at 26 weeks gestation (Wright, 1998). This means that these babies are processing touch, pain, temperature, sound and light by 26 to 28 weeks of gestation. Well defined periods of sleep and wakefulness are present in utero from 28 weeks forward (Wright, 1996). A3 Ultrasonic recordings of fetal responses to needle punctures in utero and intrauterine blood sampling reveal that unborn children between 20 and 24 weeks gestation demonstrate hormonal responses to pain consistent with fetal perception of pain and were correlated with duration of the painful stimuli (Wright, 1998). Within ten minutes of inserting a needle into an unborn child's hepatic artery for transfusion, the unborn child shows a 590% rise in beta endorphin and a 183% rise in cortisol (Giannakoulopoulos, 1994). Beta endorphin is a biochemical produced in response to pain and cortisol is a biochemical produced in response to stress. By sixteen weeks gestation, unborn children have been recorded in reaction to the experience of amniocentesis by shrinking away from the needle or by attacking the barrel of the needle. Following this procedure, the unborn child's heart rate gyrates and different children react differently, some remaining motionless and some ceasing breathing motions for several days (Chamberlain, 2003). This is clear behavioral response to a painful stimulus. A3

Some scientists and psychologists, while recognizing all of the sensory and biochemical data, determine that while the unborn child may sense pain that it cannot appreciate pain because of a lack of cortical activity. Dr. Stuart Derbyshire (2003) and research fellow Ann Furedi conclude that fetal pain is a misnomer because the fetus does not have enough cortical integration to be able to interpret pain (Derbyshire & Furedi, 1996). Birnholz (1981) demonstrated that babies as early as 23 weeks gestation demonstrate rapid eye movement during sleep. Rapid eye movement is very highly correlated with dreaming. Dreaming, a cortical activity integrating experiences into the

various portions of the cortex, involves coherent movements of the face and extremities in synchrony with the dream itself and manifests itself with either pleasant or unpleasant facial expressions. Dreaming is neither reactive nor evoked but is endogenous and indicative of inner mental or emotional conditions (Chamberlain, 2003). Any new experience remains uninterpreted until it is experienced by the organism. This is true for the mature and the immature organism. Therefore, whether or not the unborn child can interpret the experience of pain, this child does experience it! A4

Increased sensitivity to pain of preterm infants and unborn children compared to their term counterparts:

Historically, it was thought that the preterm infant had less sensitivity to pain than did the term neonate or adult human. Studies now reveal this to be false. Five key indicators have been used to demonstrate this pain perception. The first is the cutaneous flexor reflex. This is used to determine when the connection between the skin and the spinal cord are first made in the unborn child. This reflex has been shown to parallel pain perception in terms of threshold, peak intensity, and sensitivity to analgesics in adult humans. Thus, that the threshold is lower in the preterm neonate indicates that pain perception is more easily triggered than in the adult (Wright, 1996).

The second indicator is neurotransmitter development. This development in the dorsal horn of the spinal cord has early and abundant expression of those neurochemicals mediating pain. Furthermore, the preterm neonate demonstrates a greater sensitivity with less ability to inhibit pain perception because of underdeveloped pain control mechanisms in the spinal cord. Improved survivability and improved clinical outcomes have been demonstrated in research studies in neonatal intensive care units where micro-premies in one group received morphine analgesia and their like age counterparts did not receive pain control. The results of this study clearly indicate that the outcomes are greatly improved with the administration of pain

control medications. The neonates were from 24 to 32 weeks gestation (Anand, et al., 1999). A4

In accord with this study is the third key indicator. Researchers have demonstrated that the opioid centers in the fetal brain stem have very high density. It is thought that this mechanism protects the unborn child from overstimulation of the pain tracts prior to the development of other control mechanisms such as gate control (Wright, 1996). A4

Fetal surgery and neurochemicals studies, the forth indicator, have demonstrated that pain and surgical stress can be measured by the outpouring of pituitary, adrenal, and pancreatic hormones as well as by cardiovascular responses. This is in accord with pain research conducted on adults. These same researchers demonstrate that anesthesia for the unborn child may contribute to stress suppression and improved postoperative clinical outcome for this unborn child. Significantly, the addition of pain medication along with other forms of anesthesia was much more effective in suppressing stress response and improving postoperative outcomes (Wright, 1998). A4-5

Higher concentrations of the pain medications, the fifth indicator of pharmacokinetic studies, were needed to maintain surgical anesthesia in preterm neonates than in older patients. Changes in the expression of pain do occur, however, this illustrates a communication specificity, not a pain threshold change (Wright, 1996). A5

Effects of maternally administered anesthesia on the fetus with respect to pain management: Local anesthetics administered to the mother do not have any affect on the unborn child. Furthermore, intravenous sedation/anesthesia has minimal effects on the unborn child because the mother's liver clears much of the drug prior to the drug reaching the uterus and because the placental barrier screens chemicals entering into the fetal circulation. Because the fetus has more opioid receptors, it takes much higher doses to saturate the increased receptors and achieve a therapeutic response. The maternal receptors are saturated prior to

the drug reaching the unborn child, thus, the child is minimally affected (Wright, 1996).

The age of viability of the unborn child with the advent of new neonatal research and clinical advances:

> The gestational age of viability of the very preterm neonate has steadily progressed downward from 28 weeks in 1973 to 23 weeks in 1998 because of the vast improvement in medical assistance available for the very early preterm neonate. The term "micro-premie" has been coined to describe these 23 to 28 week gestation preterm neonates (Wright, 1998). In a longitudinal study of infants born between May 1988 and September 1991 in one hospital, it was found that 15% of infants born at 23 weeks, 56% born at 24 weeks, and 79% born at 25 weeks survived for at least six months (Allen, et al., 1993). By 1994, infants at 23 to 24 weeks gestation had fair chances of survival and infants at 25 weeks and greater had good chances. In Japan, the Japanese Eugenics Act was amended to place to age at 22 weeks. In 1997 they reported 18% survival rates of micro-premies at 22-23 weeks (Oishi, et al., 1997). At any gestational age, these preterm infants should be provided compassionate care and pain control (Fetus and Newborn Committee, et al., 1994). A5

Statistics of abortion and late term abortion for early abortions see Appendix:

> The lower court's decision to deny Petitioner's motion on grounds of mootness should not prevent this Court from considering her motion on the merits. The dismissal of this case on procedural grounds will only defer consideration of these issues to a later date. The time is ripe for this Court to squarely address the question of whether it is unjust for *Roe* to continue to have prospective application given the substantial changes in law and fact since 1973. Increasing sophistication in methods of scientific research have provided greater understanding and knowledge of the previously cloaked interuterine environment. Sonogram technology has improved, giving adults a clearer view into the womb. Fetal medicine improved, giving adults hands on experience with children in the

> womb. Premature birth rates have increased effecting greater numbers of person-to-person experiences with children who were gestationally younger and younger, dispelling previously held pre-human theories about prenatal life.

Neonatal medicine has improved dramatically, effecting high levels of care and compassion for all children, regardless of their gestational age at birth. This compassionate care pointed critical questions about the hundreds of thousands of unborn children who were dying during elective termination of pregnancy, or abortion, and who were the same gestational age or older than the prenatal patients who received, at the very minimum, pain management. None of the unborn children received pain management during abortion.

Elective terminations of pregnancies, abortions, are estimated 40 million in the last thirty years. An estimated 1.5% of these abortions have been performed at 21 weeks of gestation or older. Intrauterine surgeries provide strong evidence that pain management for unborn children is essential in successful procedures. Sensory perception has been demonstrated for all of the senses including the perception of pain. Response to touch, has been demonstrated in the unborn child as early as six weeks gestation. Therefore, if abortion is to be continued, anesthesia of the unborn child is the only mechanism available to avoid horrific pain.

Under *Roe v. Wade*, 410 U.S. 113 (1973), the fetus was not considered an unborn child until the third trimester and *Stenberg* seems to be following that trimester approach *Casey* overturned. The *Roe* court did not have the current medical and scientific evidence giving an understanding of fetal pain. This case presents the Court with a unique opportunity to consider whether it is just for *Roe v. Wade* to continue to have prospective application in light of the substantial changes in the factual assumptions and constitutional law underlying *Roe* that have taken place since 1973.

C. WOMEN ARE SUFFERING GREAT PSYCHOLOGICAL HARM

Women are suffering great psychological harm because they find out only later, after an abortion, of the unwitting pain they have inflicted upon their own children. (See Affidavits of Women, Petitioner's Brief.)

D. WOMEN ARE NOT MAKING INFORMED DECISIONS

Thirty years of experience with abortion has shown that women are not making informed decisions because they are not given information concerning the humanity of the fetus and scientific evidence of fetal pain. (See Affidavits of Women, Petitioner's Brief.)

E. PARTIAL BIRTH, FETAL PAIN, AND ABORTION SURVIVOR CASES

The Fifth Circuit decision on procedural grounds deprived *McCorvey* of the right for her motion to be heard on the merits, which will only defer consideration of these issues to a later date because Partial Birth, Fetal Pain, and Injury to Abortion Survivors cases will be coming before this Court.

III. *ROE V. WADE* IMPEDES, RATHER THAN INFORMS OR ADVANCES, THE NATURAL DEVELOPMENT OF FAMILY AND REPRODUCTIVE LAW, WHICH OTHERWISE HAS INCREASINGLY PROVIDED FOR ADVOCACY OF CHILDREN'S RIGHTS, WITH CONCURRENT ADVOCACY OF PARENTAL RIGHTS.*

A. A CHANGE IN THE LAW MAKES THE PROSPECTIVE USE OF *ROE V. WADE* IMPERMISSIBLY UNJUST

1) LEAD-IN TO 1973

Roe v. Wade was "set" in a very different legal milieu than exists today. Amidst different state legislatures'

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* This argument was developed by Marianna Trzeciak, Esq., an inactive member of the bars of NJ and PA.

consideration of changes in the Model *Penal* Code regarding abortion, circa 1967-1973, different courts were rendering decisions involving abortion in *criminal* cases. The crimes tended to involve domestic violence or proscribed behavior in the commission of an abortion.

For example, the California Supreme Court considered abortion law from the time of Coke, Blackstone and Hale when faced with a husband who had beaten his estranged wife, killing her unborn daughter (a viable fetus); and the legal issue was whether it would deny the husband due process of law to try him for the murder of a "human being," per the California criminal statutes. *Keeler v. Superior Court of Amador County*, 87 Cal. Rptr. 481, 2 Cal. 3d 619, 470 P. 2d 617 (1970).

Another example is of an abortionist who was tried for the crime of producing abortions not done for the preservation of the mother's life or health; and the legal issue was whether it would deny the abortionist due process of law to try him under a statute where the term "health" was argued (unsuccessfully) to be unconstitutionally vague. *United States v. Vuitch*, 402 U.S. 62 (1971).

Guardians ad litem for the unborn were not heard at trial. In fact, guardians ad litem at the time were more likely to appear in law involving inheritance of property, i.e., in courts of equity. See, e.g., *In re Hoppe*, 32 N.J. Super. 460 (Bergen County Ct., 1954); *In re Moran*, 116 N.J. Super. 238 (App. Div. 1971).

It is respectfully submitted that, in fact, abortion looks very different in the "eyes of equity": "Where One of Two Innocent Parties Must Suffer He Through Whose Agency the Loss Occurred Must Bear It. . . . " 2 Pomeroy section 363, p. 9. See also *Wenner v. Texas Lottery Com'n*, 123 F.3d 321, *suggestion for rehearing denied*, 132 F.3d 1458 (5th Cir.), *cert. den.*, 118 S.Ct. 1514, 140 L.Ed. 2d 667 (1997) [Texas].

2) AFTER JANUARY, 1973

The law of children's rights is substantially changed from what it was at the time of *Roe v. Wade*; therefore, it is unjust to permit its continuing effects.

B. BEST INTERESTS OF THE CHILDREN STANDARD

Throughout all jurisdictions, there is a standard known as the protection or consideration of the "best interests of the children." (Appendix B)

The "best interests of the child" standard does not govern parents' or guardians' exercise of custody; however, before a child's interests may be subordinated to another child's or even a parent's or guardian's, certain minimum requirements of child care must be met. *Reno v. Flores*, 113 S.Ct. 1439, 507 U.S. 292, 123 L.Ed. 2d 1, *on remand Flores by Galvez-Maldonado v. Meese*, 992 F.2d 243 (9th Cir. 1993).

Therefore, either in court ("best interests") or in the domestic sphere ("minimum requirements"), a child must receive advocacy or care.

C. GUARDIANS AD LITEM

The increase in reports of child abuse and neglect, divorce, juvenile offenses and other social factors since *Roe v. Wade* has created particular growth in the area of law of guardianship of children. See US Department of Health and Human Services, US Advisory Board on Child Abuse and Neglect, Child Abuse and Neglect: Critical First Steps in Response to a National Emergency, Washington, D.C., U.S. Government Printing Office, 1990. (Appendix B)

A guardian ad litem (GAL), also known as a court-appointed special advocate (CASA) [herein this brief subsumed under the acronym "GAL"] is usually a lawyer or a volunteer who participates as advocate for children in courtroom proceedings which include children. See, e.g., Victims of Child Abuse Act of 1990 (P.L. 101-647) and Indian Child Protection and Family Violence Act of 1990 (P.L. 101-630).

It was after *Roe v. Wade* that GALs rose to prominence and, in fact, organized for professional development. For example, in 1976, Superior Court Judge David Soukup of Seattle, Washington, obtained funding to recruit and train community volunteers to be GALs (there known as CASAs). "History of CASA," National

CASA Association website, *at* www.nationalcasa.org, Seattle, Washington, 2004 ("History of CASA"). Judge Soukup's work became the pilot program which was so successful that the work of volunteer GALs went nationwide in 1982, with the formation of the National Court Appointed Special Advocate Association. *Id.* The National CASA Association receives funds from the National Council of Juvenile and Family Court Judges, under the direction of the US Department of Justice, the Office of Juvenile Justice and Delinquency Prevention, as well as the US Department of Health and Human Services. *Id.* In 1990, the US Congress authorized expansion of CASA with the passage of the "Victims of Child Abuse Act of 1990," *supra*, so that a "court-appointed special advocate shall be available to every victim of child abuse or neglect in the United States that needs such an advocate." *Id.*

D. OTHER STATE LAWS

In virtually every context outside the abortion debate, the unborn are recognized as having a protectable right. See, Strahan, Legal Protection of the Unborn Child Outside the Context of Induced Abortion, 11 Association for Interdisciplinary Research in Values and Social Change (March/April 1997); Civil Rights – Fetus as a Person, 64 ALR Fed 886; Wasserstorm, Homicide Based on Killing of Unborn Child, 64 ALR5th 671; Wakefield, Unborn Child as Insured or Injured Person Within Meaning of Insurance Policy, 15 ALR4th 548.

Roe took factual situations which belonged and still belong in equity and examined them solely through the lens of the criminal law theory of substantive due process. *Roe* is increasingly archaic *vis-a-vis* the development of child and family protection laws and yet stands in the way of further (unimpeded) development of these laws. See concurring opinion of Judge Edith Jones, *McCorvey* slip op., *supra*.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PAMELA LAMBERT
Counsel for Amici Curiae

January 2005

APPENDIX A

ABSTRACT

Increasing sophistication in methods of scientific research provide greater understanding and knowledge of the previously cloaked intrauterine environment. Sonogram technology has improved, giving adults a clearer view into the womb. Fetal medicine improved, giving adults hands on experience with children in the womb. Premature birth rates increased effecting increased numbers of person-to-person experiences with children who were gestationally younger and younger dispelling previously held pre-human theories about prenatal life. Neonatal medicine improved dramatically, effecting high levels of care and compassion for all children, regardless of their gestational age at birth. This compassionate care pointed critical questions about the hundreds of thousands of unborn children who were dying during elective termination of pregnancy, or abortion, and who were the same gestational age or older than the prenatal patients who received, at the very minimum, pain management. None of the unborn children received any pain management during abortion. Elective terminations of pregnancies, abortions, are estimated 40 million in the last thirty years. An estimated 1.5% of these abortions have been performed at 21 weeks of gestation or older. Intrauterine surgeries provide strong evidence that pain management for unborn children is essential in successful procedures. Sensory perception has been demonstrated for all of the senses including the perception of pain. Response to touch, has been demonstrated in the unborn child as early as six weeks gestation. Therefore, if abortion is to be continued, anesthesia of the unborn child is the only mechanism available to avoid horrific pain.

The Prenatal Child: Issues on Sentience

Fetal anesthesia including analgesia:

Fetal surgery has been performed for four decades. The first decade resulted in about a 100% death rate. However, since that time and with drastic improvements in anesthesia, the survival rate for the unborn child undergoing surgery is very encouraging. In studies of this unborn patient, the use of analgesia along with anesthesia and paralytics, improved the clinical outcomes. (Cauldwell, Charles B., et.al., 2001). In a survey of British neuroscientists, 80 percent responded that they thought the fetus should receive pain control after 11 weeks gestation so that any error committed would be on the side of pain prevention. A British commission on fetal sentience concluded that the growing body of evidence indicates that the unborn child may experience suffering from around 11 weeks gestation. Dr. Robert White recommends that mothers receiving information about abortion also receive information about the pain and suffering the unanesthetized unborn child will experience. In this way, she will be better able to decide on a course of action (White, 1995).

Unborn children usually live inside their mother's wombs forty weeks. These are called the weeks of gestation. This sounds a little like the description of a process one might find on a home-made bread recipe. It might say, "Let the dough rise for two hours." In the past, no one could know what was really going on inside the womb. People thought maybe unborn children were going through a similar process as bread dough. This was logical since the mother's abdomen somewhat resembled bread dough as it grew

> in size and roundness. Advances in medical, scientific, and technical abilities have changed understanding of whom and what unborn children are. We now know that the time humans spend inside their mother's womb is not some type of changing from one thing into something else. We now know that this time is really just the early stages of normal growth and development that begins at conception and continues throughout the person's existence.
>
> Humans are described by different words. During the time a human lives inside their mother's womb they may be called, embryo or fetus.

(Merriam Webster, 2003)

1) Fetal development with respect to pain; 2) Increased sensitivity to pain of preterm infants and unborn children compared to their term counterparts; 3) Effects of maternally administered anesthesia on the fetus with respect to pain management; 4) The age of viability of the unborn child with the advent of new neonatal research and clinical advances; 5) Statistics of abortion and late term abortion; 6) The methodology of abortion throughout the gestational period; 7).Reasons cited for late term abortion; and 7) Anesthesia and analgesia for the unborn child during abortion.

Fetal development with respect to pain:

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adults can be carried in unmyelinated or thinly myelinated fibers. Additionally, the nerve tracts associated with nociception in the spinal cord (reflex pain fibers) and brain stem are completely myelinated up to the thalamus by 30 weeks gestation. The thalamus is the brain organ that integrates all sensory stimulation except smell and sends signals to the various parts of the cortex for processing. The unborn child's neocortex begins development at 8 weeks gestation and has a full complement of neurons by 20 weeks. The connecting components of cortical neurons (dendrites) proliferate and connections with the thalamus and other portions of the cortex occur. These connections occur between 20 and 24 weeks gestation (Anand, et.al., 1987). With this integration in mind, it is not surprising that EEG (brain wave) patterns in preterm babies of less than 28 weeks gestation are present with both visual and auditory evoked potentials demonstrating cortical components, and somatosensory (touch, pain, heat and cold) evoked potentials were measured at 26 weeks gestation (Wright, 1998). This means that these babies are processing touch, pain, temperature, sound and light by 26 to 28 weeks of gestation. Well defined periods of sleep and wakefulness are present in utero from 28 weeks forward (Wright, 1996).

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shows a 590% rise in beta endorphin and a 183% rise in cortisol (Giannakoulopoulos, 1994). Beta endorphin is a biochemical produced in response to pain and cortisol is a biochemical produced in response to stress. By sixteen weeks gestation, unborn children have been recorded in reaction to the experience of amniocentesis by shrinking away from the needle or by attacking the barrel of the needle. Following this procedure, the unborn child's heart rate gyrates and different children react differently, some remaining motionless and some ceasing breathing motions for several days (Chamberlain, 2003). This is clear behavioral response to a painful stimulus. Some scientists and psychologists, while recognizing all of the sensory and biochemical data, determine that while the unborn child may sense pain that it cannot appreciate pain because of a lack of cortical activity. Dr. Stuart Derbyshire (2003) and research fellow Ann Furedi conclude that fetal pain is a misnomer because the fetus does not have enough cortical integration to be able to interpret pain (Derbyshire & Furedi, 1996). Birnholz (1981) demonstrated that babies as early as 23 weeks gestation demonstrate rapid eye movement during sleep. Rapid eye movement is very highly correlated with dreaming. Dreaming, a cortical activity integrating experiences into the various portions of the cortex, involves coherent movements of the face and extremities in synchrony with the dream itself and manifests itself with either pleasant or unpleasant facial expressions. Dreaming is neither reactive nor evoked but is endogenous and indicative of inner mental or emotional conditions (Chamberlain, 2003). Any new experience remains uninterpreted until it is experienced by the organism. This is true for the mature and the immature

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Historically, it was thought that the preterm infant had less sensitivity to pain than did the term neonate or adult human. Studies now reveal this to be false. Five key indicators have been used to demonstrate this pain perception. The first is the cutaneous flexor reflex. This is used to determine when the connection between the skin and the spinal cord are first made in the unborn child. This reflex has been shown to parallel pain perception in terms of threshold, peak intensity, and sensitivity to analgesics in adult humans. Thus, that the threshold is lower in the preterm neonate indicates that pain perception is more easily triggered than in the adult (Wright, 1996).

The second indicator is neurotransmitter development. This development in the dorsal horn of the spinal cord has early and abundant expression of those neurochemicals mediating pain. Furthermore, the preterm neonate demonstrates a greater sensitivity with less ability to inhibit pain perception because of underdeveloped pain control mechanisms in the spinal cord. Improved survivability and improved clinical outcomes have been demonstrated in research studies in neonatal intensive care units where micropreemies in one group received morphine analgesia and their like age counterparts did not receive pain control. The results of this study clearly indicate that the outcomes are greatly improved with the administration of pain control

medications. The neonates were from 24 to 32 weeks gestation (Anand, et.al., 1999).

In accord with this study is the third key indicator. Researchers have demonstrated that the opioid centers in the fetal brain stem have very high density. It is thought that this mechanism protects the unborn child from overstimulation of the pain tracts prior to the development of other control mechanisms such as gate control (Wright, 1996). Fetal surgery and neurochemicals studies, the forth indicator, have demonstrated that pain and surgical stress can be measured by the outpouring of pituitary, adrenal, and pancreatic hormones as well as by cardiovascular responses. This is in accord with pain research conducted on adults. These same researchers demonstrate that anesthesia for the unborn child may contribute to stress suppression and improved postoperative clinical outcome for this unborn child. Significantly, the addition of pain medication along with other forms of anesthesia was much more effective in suppressing stress response and improving postoperative outcomes (Wright, 1998).

Higher concentrations of the pain medications, the fifth indicator of pharmacokinetic studies, were needed to maintain surgical anesthesia in preterm neonates than in older patients. Changes in the expression of pain do occur, however, this illustrates a communication specificity, not a pain threshold change (Wright, 1996).

Effects of maternally administered anesthesia on the fetus with respect to pain management:

Local anesthetics administered to the mother do not have any affect on the unborn child. Furthermore, intravenous sedation/anesthesia has

minimal effects on the unborn child because the mother's liver clears much of the drug prior to the drug reaching the uterus and because the placental barrier screens chemicals entering into the fetal circulation. Because the fetus has more opioid receptors, it takes much higher doses to saturate the increased receptors and achieve a therapeutic response. The maternal receptors are saturated prior to the drug reaching the unborn child, thus, the child is minimally affected (Wright, 1996).

The age of viability of the unborn child with the advent of new neonatal research and clinical advances:

> The gestational age of viability of the very preterm neonate has steadily progressed downward from 28 weeks in 1973 to 23 weeks in 1998 because of the vast improvement in medical assistance available for the very early preterm neonate. The term "micro-premie" has been coined to describe these 23 to 28 week gestation preterm neonates (Wright, 1998). In a longitudinal study of infants born between May 1988 and September 1991 in one hospital, it was found that 15% of infants born at 23 weeks, 56% born at 24 weeks, and 79% born at 25 weeks survived for at least six months (Allen, et.al., 1993). By 1994, infants at 23 to 24 weeks gestation had fair chances of survival and infants at 25 weeks and greater had good chances. In Japan, the Japanese Eugenics Act was amended to place to age at 22 weeks. In 1997 they reported 18% survival rates of micro-preemies at 22-23 weeks (Oishi, et.al., 1997). At any gestational age, these preterm infants should be provided compassionate care and pain control (Fetus and Newborn Committee, et.al., 1994).

Statistics of abortion and late term abortion: Statistics on abortion have been collected since 1969 by the Centers for Disease Control and since 1974 by The Alan Guttmacher Institute. The Centers for Disease Control and Prevention (CDC) collects abortion data to focus on the safety of the procedure and collects its data through reports from state health departments. These vary in completeness and are not available at all from Alaska, California, Iowa, New Hampshire, and Oklahoma. The information contained in these reports may be lacking on 40 to 50% of the abortions performed in the state. Limited surveys of abortion providers and general estimates are made for these states. Forty states report on the type of abortion procedure used and general demographic characteristics of women having abortions. The Alan Guttmacher Institute (AGI) concerns itself with the availability of abortion services throughout the United States. This data is collected via surveys of all known abortion providers, numbering 2,380 nationwide (Alan Guttmacher Institute, 1997). AGI is accepted as more accurate, recording all but those performed by physicians in their offices for their own patients. Reports by AGI average 15% higher than those reported by the CDC. Typically, surgical abortions are performed in hospitals or clinics. If this method becomes widely available in private physician's offices, underreporting is likely to increase (Alan Guttmacher Institute, 1997).

All of the reported numbers are at the low end of the actual number of abortions. Several factors are involved. First, abortions are under reported. Second, the data regarding late term abortions is incomplete, in part because the

number of physicians performing late term abortions is relatively few and those have large caseloads. Considering this, even one physician per geographic region not reporting would drastically skew the data. Labor may be induced for conditions other than elective abortions and the reports of fetal deaths that are removed from the mother via this methodology may be reported as abortions (Alan Guttmacher Institute, 1997). With all of these factors affecting the accuracy of the data, it is still important to examine the data as it has been reported over the thirty years since *Roe* v. *Wade* in order to gain an appreciation of the magnitude of the issues of fetal pain.

Given these reporting caveats, it is estimated from extrapolated figures from unpublished data compiled from 14 states reporting to the National Center for Health Statistics (NCHS) that the number of abortions performed after 26 weeks ranges from 320 to 600 annually. All of these abortions are performed after the age of viability. The CDC reports that approximately 1 to 1.5% of all abortions are performed after 20 weeks gestation. This translates to approximately 16,450 (1992) to 20,490 (1996) annually (The Alan Guttmacher Institute, 1997; CDC, 1996). The total number of abortions in 1992 was 1,528,930 (The Alan Guttmacher Institute, 1997) and 1,366,000 in 1996 (CDC, 1996). Since 1973, approximately 40,000,000 unborn children have been voluntarily terminated in the United States and approximately 480,000 have been after the 20th week of gestation. Remember, this number is probably very low because of the underreporting that occurs in most states. The CDC estimates that these numbers may represent from 50% to 60% of the actual abortions performed in

the United States (CDC, 1996). Teens are more likely than older women to delay abortion until late in the gestational term and approximately half of the women seeking late term abortion do so because of difficulties in affording, finding or getting services (CDC, Alan Guttmacher Institute, 1990; CDC, 2002).

The methodology of abortion throughout the gestational period:

The gestational period in the human is approximately 39 to 40 weeks from the beginning of the woman's last menstrual period. This gestational period is generally divided into trimesters with the first ending at the end of the 13th week, the second ending after week 24 and the third ending at the birth of the child. Abortion methodologies differ according to the gestational age of the unborn child. Early abortions are much easier to perform and are much safer for the mother (1 in 100,000 maternal deaths). The maternal death risks increase by 30% each week after 12 weeks gestation (Encarta, 2003).

During the first 72 hours after unprotected sex, a pill, commonly referred to as the "morning after pill", is taken by the mother and a second pill is taken 12 hours later. This inhibits ovulation or alters the lining of the uterus preventing implantation of a fertilized egg. Within the first seven weeks of pregnancy, abortion pills of RU-486 or mifepristone blocks the hormone progesterone. Progesterone is essential in maintaining the pregnancy. A second drug, misoprostol, is taken 48 hours later to induce uterine contractions to expel the fetus. A third drug may be taken in combination with misoprostol. That is the chemotherapy (anticancer) drug methotrexate.

This drug interferes with cell division and kills the fetus (Encarta, 2003).

Two surgical techniques are used during the first trimester: preemptive abortion and early uterine evacuation. In both methods, a narrow tube is inserted through the cervix into the uterus and attached to a suction devise like a syringe. The contents of the uterus are then sucked out. This includes the unborn child. The preemptive abortion uses a smaller cannula and is performed prior to the first four to six weeks while the early uterine evacuation uses a larger cannula and is performed from six to eight weeks. Both methods risk infection and bleeding (Encarta, 2003).

Vacuum aspiration requires that the cervix be dilated so a cannula can be inserted into the uterus. This occurs from the 6th week to the 14th week of gestation. Dilators of progressive sizes may be used to open the cervix enough to insert the larger cannula for the aspiration. Again, the contents and the lining of the uterus are sucked out (Encarta, 2003). Local anesthesia is all that is necessary for the mother. Dilation and curettage (D&C) is performed from the 6th to the 16th week and is similar to vacuum aspiration. The cervix is dilated and then the uterus is scraped to remove the contents. A D&C may require general anesthesia and must be performed in a clinic or hospital. The vacuum aspiration has nearly replaced the use of the D&C (Encarta, 2003). Abortion becomes much more difficult and risky after the 16th week. Dilation and Evacuation (D&E) requires greater dilation of the cervix than other methods. It also requires the use of suction, a large curette (scraping tool), and a grasping tool called forceps to remove the fetus. The suction

will frequently remove limbs from the unborn child prior to its death. This causes the unborn child extreme pain. The size of the fetus is a major issue as is the thinness of the uterine wall. Bleeding frequently occurs. This procedure is typically performed during the second trimester but may occur as late as 24 weeks (Encarta, 2003).

Induction abortion can also be performed during the second trimester. This requires that a small amount of amniotic fluid be removed and another chemical injected to replace it. This other chemical induces labor within the next one to two days. Heavy bleeding, infection and cervical injury are frequent. This requires hospitalization of one or more days (Encarta, 2003). The unborn child may be born alive then terminated or may die during the stress of the labor process. This child experiences pain in response to the chemical induction.

Abortions performed at the end of the second trimester and during the third trimester require major surgery. A hysterotomy is similar to a cesarean section with the abdomen cut open and the unborn child removed and terminated (Encarta, 2003). This is performed from 24 weeks gestation forward. With today's technology available in neonatal intensive care units, this unborn child would be viable (able to live).

The other procedure performed in late term (24 weeks forward) is the intact dilation and extraction or partial birth abortion. The techniques utilized in partial birth abortion include two components that cause considerable infliction of pain upon the unborn child of sufficient gestational age to perceive this pain. The first is the

extraction of the infant from the uterus through manipulation and compression and to drag the unborn child through the birth canal feet first so that only the head remains partially within the canal. The rest of the unborn child has been externalized and is delivered. This causes severe multiple painful stimuli. Second, an actual incision is made into the scalp tissues into the upper cervical canal and posterior fossa (opening) of the skull. As with any cut, pain occurs. Once the cut is made, a tube is inserted into the hole and the unborn child's brain is sucked out. This occurs in unborn children 24 weeks and slightly older. With current medical techniques, these children are viable. All of this is performed with no anesthesia to the unborn child. This is torture and is not tolerated in animal experimentation but is performed routinely to human beings. White concludes that "pain in the rat is ethically more reprehensible than pain in the human fetus" (White, 1995). Late term abortions are much riskier for the mother with 1 in 8,000 dying as a result of the procedure (Encarta, 2003).

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AFFIDAVIT

STATE OF TEXAS)
) **SS**
COUNTY OF)

I, the undersigned, do hereby certify that the following argument incorporates research on the scientific changes in medical knowledge in regard to fetal viability/humanity and fetal pain since the decisions of *Roe* and *Casey*. The abstract is written and edited by the Suzanne Besser, BS and Dr. Lucinda Harman, RN, MA, PhD, and attached in its entirety as an Appendix.

I have my Bachelors in General Studies and secondary teaching certification from the University of Mary Hardin-Baylor. My master's studies are in counseling. I began researching, writing and speaking on issues involving prenatal children in 1983. I have spoken to physicians and other professional organizations on these issues across the United States and introduced the issue of the prenatal child's ability to experience sensation including pain, to the State of Texas House Bill 15 "A Woman's Right to Know" brochure workgroup. My work prompted the group's inclusion of two statements, concerning sensation and pain, in their brochure.

Dr. Lucinda Harman has her Masters and PhD in Neuro Science from the University of Louisville. She is a registered nurse, has practiced neonatal intensive care nursing, and done research in neonatology.

As evidence of this Affidavit, I have hereunto set my hand this 1st day of February, 2005.

/s/ Suzanne Besser
Suzanne Besser

Subscribed and sworn to before me this 1st day of February, 2005.

/s/ Mary Ruth Miller
Notary Public

My Commission Expires:

[Seal] MARY RUTH MILLER
Notary Public, State of Texas
My Commission Expires
July 9, 2007

APPENDIX B

ABSTRACT

STATUTES:

Ala. Code 1996, § 30-3-152 (Silent)

Alaska Stat. § 25.24.150 (Silent)

Ariz. R.S. §§ 25-321. (Silent), 25-403

Ark Code Ann. §§ 6-71-138
Ark Code Ann. §§ 9-13-101

Cal. Pen. C. §§ 3040 to 3048 (Silent)
Cal. Pen. C. §§ 3010 to 3011

Colo. R.S.A. §§ 14-10-116
Colo. R.S.A. §§ 14-10-124

Conn. G.S.A. § 319-319J
Conn. G.S.A. § 802-803
Conn. G.S.A. § 813
Conn. G.S.A. § 815(j)(p)(t)(y)
Conn. G.S.A. § 895
Conn. G.S.A. § 967
Conn. G.S.A. § 882

Del. Code 72 § 9007(a)

Fla. S.A. 61 §§ 61.403
Fla. S.A. 61 §§ 61.13

Hawaii RS §§ 587-34
Hawaii RS §§ 587-24

Idaho C. §§ 10-1632

Ill. CS 5/602 S.H.A. 750
Ill. CS 405/2-17 S.H.A. 705

Iowa C.A. §§ 598.12
Iowa C.A. §§ 598.41

Kan. S.A. 38-1505
Kan. S.A 38-1559

Ky. R.S. 403.270
Ky. R.S. 620.027
Ky. R.S. 625.041

La. CHC 1269.4
La. CHC 675
La. CHC 710
La. CHC 1641
La. CHC 1632
La. CHC 1633
La. CHC 1637
La. CHC 1638

Me. R.S.A. 694 § 1653(b), (e)
Me. R.S.A. 55 § 1507

Md. Code §§ 5-525.1., 10-118

Mass. G.L.A. c. 208, §§ 31
Mass. G.L.A. c. 201, §§ 34

Mich. C.L.A. § 330.1723a
Mich. C.L.A. § 330.1616
Mich. C.L.A. § 722.27

Minn. S.A. § 257.0762 (Silent)
Minn. S.A. § 259.65
Minn. S.A. § 259.20
Minn. S.A. § 260C.301

Miss. Code § 43-15-13
Miss. Code § 43-21-311
Miss. Code § 93-5-23
Miss. Code § 9-5-89
Miss. Code § 43-21-121
Miss. Code § 93-5-9

Mo. V.A.M.S. § 452.423 (Silent)
Mo. V.A.M.S. § 453.025
Mo. V.A.M.S. § 210.160
Mo. V.A.M.S. § 211.462
Mo. V.A.M.S. § 507.200
Mo. V.A.M.S. § 452.402

Mont. CA § 40-4-205, 40-4-212

Neb. R.R.S. § 43-533, 42-364, 43-292.01, 43.163

Nev. R.S. §125C.010, 65.0107
N.H. RSA §458:17-a
N.H. RSA § 169-C:10

N.J.S.A. 2A:4A-39

N.M.S.A. § 32A-1-7
N.M.S.A. § 40-4-9.1

N.Y. Penal Law § 14-5-70 to 14-5-73
N.Y. Penal Law § 14-6-80

N.C.G.S. § 35A-1107
N.C.G.S. § 50A-25

N.D.C.C. § 14-09-06.1
N.D.C.C. § 14-09-06.2
N.D.C.C. § 14-09-06.4

Ohio R.C. § 3109.04

Okl. St.Ann. § 10-1415
Okl. St.Ann. § 10-7003-3.7
Okl. St.Ann. § 10-7505-1.2
Okl. St.Ann. § 43-109

Ore. RS § 107.27(a)

Pa. Stat. 246/800 § 806
Pa. Stat. 246/800 § 805

S.C. Code § 20-7-85
S.C. Code § 20-7-110
S.C. Code § 20-7-121
S.C. Code § 20-7-124
S.D.C.L. § 26-7A-18
S.D.C.L. § 26-7A-5
S.D.C.L. § 25-6-2
S.D.C.L. § 25-5A-15
S.D.C.L. § 26-7A
S.D.C.L. § 25-6
S.D.C.L. § 25-5A
S.D.C.L. § 0.7742
S.D.C.L. § 15-6-17(c)
S.D.C.L. § 29A-5-117
S.D.C.L. § 15-39-77

Tenn.C.A. § 29-29-103
Tenn.C.A. § 36-6-101

Tex. Ann. C.Cr.P. § 153.001
Tex. Ann. C.Cr.P. § 107.000(a)

Utah Code § 30-3-10
Utah Code § 75-7-305

Va. Code § 8.01-73
Va. Code § 21-310
Va. Code § 20-146.12
Va. Code § 16.1-278.15

Wash. Rev. Code § 26.10.070
Wash. Rev. Code § 26.10.100

W.Va. Code § 56-4-10
W.Va. Code § 36-2-5

Wis. S.A. § 48.01(1)(gr)
Wis. S.A. § 20.625(1)(e)

B5

Wyo. Stat.1983 § 14-7-101 to 14-7-104
Wyo. Stat.§ 20-2-201

AFFIDAVIT

STATE OF MISSOURI)
) SS
COUNTY OF BOONE)

I, the undersigned, do hereby certify that the following, Abstract B incorporates statutes on the Best Interest of the Child standard and use of Guardians Ad Litem. The abstract is researched and prepared by Heather Brinkley, and attached in its entirety as an Appendix.

I have my Associate of Science Degree in Legal Studies with an emphasis in Legal Assistant from Missouri Western State College.

As evidence of this Affidavit, I have hereunto set my hand this 3 day of February, 2005.

/s/ Heather Brinkley
Heather Brinkley

Subscribed and sworn to before me this 3rd day of February, 2005.

/s/ Elizabeth E. Parrigin
Notary Public

My Commission Expires:

ELIZABETH E. PARRIGIN
Notary Public – Notary Seal
State of Missouri
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My Commission Expires
May 22, 2006

Supreme Court, U.S.
FILED
FEB 14 2005
OFFICE OF THE CLERK

No. 04-967

IN THE

Supreme Court of the United States

NORMA MCCORVEY,
formerly known as Jane Roe,
Petitioner,

v.

WILLIAM "BILL" HILL, Dallas County District Attorney
as successor in office to HENRY WADE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICI CURIAE* OF FORMER CALIFORNIA STATE SENATOR AND CURRENT CALIFORNIA STATE ASSEMBLYMAN RAYMOND S. HAYNES AND THE UNITED STATES JUSTICE FOUNDATION, IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Should the original judgment in *Roe v. Wade* be vacated under FRCP 60(b) due to substantially changed factual and/or legal conditions that make *Roe* no longer just or equitable for prospective application?
2. Is Petitioner Norma McCorvey entitled under FRCP 60(b) to any relief, substantive or procedural?
3. Should the Court, at a minimum, require a hearing to afford fundamental due process which would lead to determining whether *Roe v. Wade* should be reexamined?

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IN THE

Supreme Court of the United States

No. 04-967

NORMA MCCORVEY,
formerly known as Jane Roe,
Petitioner,

v.

WILLIAM "BILL" HILL, Dallas County District Attorney
as successor in office to HENRY WADE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* OF FORMER CALIFORNIA STATE SENATOR AND CURRENT CALIFORNIA STATE ASSEMBLYMAN RAYMOND S. HAYNES AND THE UNITED STATES JUSTICE FOUNDATION, IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICI* [1]

Amicus former California State Senator and current California State Assemblyman Raymond S. Haynes has represented 800,000 Californians in the California Legislature. He was elected in 1994. In 1996, former Senator Haynes was

[1] Pursuant to Rule 37.6, this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici curiae*, has made a monetary contribution to the preparation or submission of this brief.

elected by the Senate Republican Caucus to serve as Republican Whip. In that position, he was responsible for generating Republican analyses for the thousands of bills that reach the Senate Floor. He also served as Chair of Constitutional Amendments Committee, Vice Chair of the Senate Judiciary Committee, Senate Health and Human Services Committee and the Public Employment and Retirement Committee, along with being a member of the Budget and Education Committees. In 2000, then-Senator Haynes served as the National Chairman of the American Legislative Exchange Council (ALEC), a national bipartisan organization of over 2,500 state legislators. Assemblyman Haynes represents his constituency in supporting Norma McCorvey's Petition for a Writ of *Certiorari*.

Amicus United States Justice Foundation is a 501(c)(3) non-profit, legal organization founded in 1979 that has regularly provided testimony on federal and state legislation involving fundamental conservative principles, including the constitutional rights of people of faith and in the protection of the unborn.

Both Assemblyman Haynes and the United States Justice Foundation urge this Court to grant *certiorari* so that Petitioner Norma McCorvey can bring before this Court the substantial factual and legal reasons why further prospective application of the *Roe* decision cannot be justified in the interests of women, their families, and our communities.

SUMMARY OF ARGUMENT

This case presents the question of whether prospective application of *Roe v. Wade* remains just and equitable given the changed factual and legal conditions surrounding abortions since 1973, and it goes to the heart of the balance that was struck in *Roe*. The district court denied Petitioner's Rule 60 Motion as untimely, stating that thirty years after *Roe* was too long. On appeal to the Fifth Circuit Court of Appeals, this matter was dismissed. Although the panel determined

that the district court had erred in concluding that Petitioner's Rule 60 Motion was untimely, the Court of Appeals held that the Motion was moot because the Texas statutes criminalizing abortion had been repealed by implication.

In this brief *amici* focus on a single legal point: *Whether Petitioner's request for relief under Rule 60 is moot because the Texas statutes that criminalized abortion have been repealed by implication.*

The Court of Appeal's finding of mootness rests on (1) the principle that lawsuits regarding the constitutionality of statutes become moot once the statute is repealed and (2) its reasoning that the Texas statutes that were at issue in *Roe* have been repealed by implication. However, the type of case that becomes moot after a statute is repealed is one challenging the constitutionality of a statute in order to have its enforcement enjoined. That is not this case. However, even it were, the mootness exception to that rule would apply here because Texas *is* likely to resume enforcing or else reenact the challenged laws if it ever gets the chance. Finally, the Texas statutes that were declared unconstitutional in *Roe* have not been repealed by implication because the later-enacted regulatory laws were intended by the legislature to regulate those abortions permitted by *Roe* and because an implied repeal will not be found where, as here, both enactments can be given some area of operation and effect.

ARGUMENT

I. IN *DIFFENDERFER* AND *FED'N OF ADVER. INDUS. EXECUTIVES*—CASES RELIED ON BY THE FIFTH CIRCUIT—PLAINTIFFS' CASES WERE MOOT FOR REASONS THAT DO NOT APPLY HERE.

The Court of Appeals found this case was moot because "[s]uits regarding the constitutionality of statutes become moot once the statute is repealed," *McCorvey v. Hill*, 385

F.3d 846, 849 (5th Cir. 2004), citing *Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 414-15 (1972) and *Federation of Advertising Industry Executives v. City of Chicago*, 326 F. 3d 924, 930 (7th Cir. 2003). In *Diffenderfer*, a citizen-taxpayer group wanted the constitutionality of a law exempting commercially used, church property from liability for taxes to be evaluated in order to enjoin the effect of that law. By the time the case got to the Supreme Court, however, the law had been repealed and replaced by a substantially different statute. The Court held that plaintiffs' request for a declaratory judgment was moot because the statute in question had been repealed. In *Federation*, an advertising federation sought to enjoin, on First Amendment grounds, an ordinance restricting outdoor advertising of alcohol and cigarettes. While the case was pending, the Supreme Court ruled that a similar Massachusetts statute was unconstitutional. In light of that decision, the City of Chicago repealed the questioned ordinance and promptly moved to dismiss the case as moot. The district court did so, and the dismissal was affirmed on appeal.

The facts that made the *Diffenderfer* and *Federation* cases moot are akin to what the situation in this case would have been if, prior to review by the Supreme Court, Texas had repealed all of its criminal abortion statutes and replaced them with a law modeled on the Uniform Abortion Act approved by the ABA in 1972.[2] Had that happened, there clearly would have been no live issue to present to this Court. In contrast, the relief now sought by Petitioner is the exact opposite of that sought by the plaintiffs in *Diffenderfer* and *Federation*. Those plaintiffs sought to halt enforcement of unconstitutional laws. Consequently, when those laws were expressly repealed, there was no enforcement to put a stop to. This left the courts with nothing more they could have done

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[2] *See Roe v. Wade*, 410 U.S. 113, 146 (1973), n. 40.

that had not already been accomplished by repeal of the laws. That is the reason for the rule articulated in *Federation*:

> "Therefore, we, along with all the circuits to address the issue, have interpreted Supreme Court precedent to support the rule that repeal of a contested ordinance moots a plaintiff's injunction *request*, absent evidence that the City plans to or already has reenacted the challenged law or one substantially similar." *Id.* at 930. [emphasis added]

But Petitioner here is not *requesting* an injunction. To the contrary, she is asking this Court to revisit the constitutionality of the pre-*Roe* Texas abortion statutes so that enforcement of those laws can be *resumed*. This is relief that is still within the power of this Court to grant. Thus, the holdings in *Diffenderfer* and *Federation* do not apply to the facts or the relief sought in this case, and Petitioner's request is not similarly moot.

II. EVEN IF *DIFFENDERFER* AND *FEDERATION* WERE CONTROLLING, THE FIFTH CIRCUIT'S FINDING THAT THE MOOTNESS EXCEPTION DOES NOT APPLY, BECAUSE TEXAS IS "UNLIKELY" TO RESUME ENFORCING OR TO REENACT PRE-*ROE* ABORTION LAWS, IS ILLOGICAL.

Both the majority and the concurring Fifth Circuit opinions concluded that "[t]he Texas statutes that criminalized abortion . . . and were at issue in *Roe* have, at least, been repealed by implication." *McCorvey, supra,* 385 F. 3d at 849 (concurring opinion *Id.* at 850). Even assuming that *Diffenderfer* and *Federation*, *supra*, were controlling in this case, the Fifth Circuit's reasoning that the mootness exception does not apply is incorrect. Despite noting an exception in cases where "there is evidence, or a legitimate reason to believe, that the state will reenact the statute or one that is substantially

similar," the Court of Appeals held that "[t]his exception does not apply to the instant case." *Id.* at 849.

If the Fifth Circuit's finding were correct that the statutes at issue in *Roe* are impliedly repealed and unlikely to be reenacted, it would follow that the injunctive effect of *Roe* and its progeny are *unnecessary* and could be vacated without any effect. That *Roe* could be overturned without any effect is absurd, but that is the logical extension—and the legal consequence—of a finding that there is "no reason to believe" Texas would, if it could, either resume enforcing or else re-enact the pre-*Roe* statutes.

The holding of *Roe* is a continuing quasi-injunctive order. The decision operates as an injunction, restraining Texas prosecutors from enforcing Texas statutes criminalizing abortion. The Supreme Court has held that a party is entitled to be relieved from the constraints of an injunction or a consent decree when the objective has been achieved, thereby demonstrating that the injunction or consent decree is no longer needed. In *Board of Education of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237 (1991), the Court held that a finding that a school district was operating constitutionally and was unlikely to return to its past ways *mandated* the termination of a desegregation order. Similarly, the Second Circuit in *Patterson v. Newspaper & Mail Deliverers' Union*, 13 F.3d 33, 38 (2d Cir. 1993) held that it is appropriate to dissolve a consent decree when it can be shown that the objectives of the decree have been substantially reached. In *Alexander v. Britt*, 89 F.3d 194 (4th Cir. 1996), the Fourth Circuit, applying *Dowell*, held that relief from a court-imposed decree aimed at remedying past unconstitutional conduct was obtainable under *Fed. R. Civ. P.* 60(b)(5) to a party who demonstrated: (1) that for a reasonable period of time, (2) the party has complied in good faith with the consent decree, (3) to the point that the vestiges of past unlawful behavior have been eliminated to the extent practicable, and

the purpose of the decree has been satisfied. *Dowell, supra*, at 249-50. *See, also, U.S. v. Eastman Kodak Co.*, 63 F.3d 95, 101 (2d Cir. 1995) (termination of antitrust decree requires defendant to "demonstrate that the basic purposes of . . . the decrees—the elimination of monopolies and restrictive practices—have been achieved.")

Logically then, if Petitioner were bringing her Rule 60(b)(5) motion simply to dissolve that quasi-injunction, such relief would be mandated, given the Fifth Circuit's finding. Certainly all of the criteria have been met under *Dowell* and *Alexander, supra,* for vacating the injunctive effect of *Roe* and its progeny, i.e., (1) for over 30 years, (2) Texas prosecutors have complied in good faith with *Roe*'s holding, and—or so claims the Fifth Circuit—(3) the vestiges of past behavior have been eliminated in that the Texas legislature is unlikely to reenact the state's pre-*Roe* abortion statutes. Implicitly, the Fifth Circuit's holding that Texas would not revive its criminal abortion laws compels the conclusion that *Roe*'s holding is no longer needed. And an injunction that is no longer needed should be vacated.

The flaw in this logic, of course, is that without the restraint of *Roe* and its progeny, Texas officials would be free to criminalize and prosecute abortions, and everyone knows it. The Fifth Circuit's holding that the mootness exception is inapplicable to this case is thus counterintuitive. Not only is Texas *likely* to criminalize abortion if given the chance, but Petitioner's extensive evidence that abortion does more to hurt women than help them makes a compelling case for why Texas *should.*

III. THE PRE-*ROE* TEXAS STATUTES THAT CRIMINALIZED ABORTION HAVE *NOT* BEEN REPEALED BY IMPLICATION.

A. Whether a statute has impliedly been repealed is a matter of legislative intent.

The question of implied repeal is essentially a question of what the legislature *intended* to be the effect of the later-enacted law. "In enacting statutes and amending codes, the legislature is presumed to have knowledge and to have considered the effect and result of a subsequent law upon a prior enactment." *Eppenauer v. Eppenauer,* 831 S.W. 2d 30, 34 (Tex. 1992). A legislative intent to repeal an earlier statute may be implied, for example, when the later enactment was clearly intended as a comprehensive treatment of the entire subject. *Gordon v. Lake*, 163 Tex. 392, 394, 356 S.W.2d 138, 139 (1962); *Meek v. Wheeler County*, 135 Tex. 454, 462, 144 S.W.2d 885 (1940).

In a 1980 Arkansas case dealing with the issue of whether an 1875 Act prohibiting abortion except to save the life of the mother was impliedly repealed by later legislation, *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980), a federal district court looked to the comprehensive nature of the later law in finding implied repeal. The 1969 Act was a Model Penal Code type statute that liberalized permissible abortions to include instances of health risks to the mother, fetal defect, and rape or incest; it also regulated abortions in various respects. Notably, both the 1875 Act and the 1969 Act dealt with the desired reach of criminal law in prohibiting abortion. The district court determined that the 1969 Act was intended to be a "substitute" for the prior law, based on the similarity of subject—the criminality of abortion—as well as its comprehensive nature. In contrast, the regulatory laws that the Fifth Circuit found to be in conflict with the pre-*Roe* prohibitory laws cannot in any way be deemed to be a "substitute" for the prior laws, e.g., trading a restrictive criminal law for a

liberalized criminal law. In asymmetric fashion, rather, the later-enacted laws respond to the void left by the removal of Texas' prohibitory laws, scrambling to regulate the vast class of abortions made legal by the Court. Other distinctions between the facts supporting the implied repeal found in *Smith* and the contrary scenario of this case are noted by this commentator:

> "It is critical that the legislature's liberalization of abortion law was not coerced by judicial action. The stricter 1875 Act was fully enforceable when the legislature chose to enact statutes less protective of the unborn. The newer Act must be seen as a free political act, rather than as the response of a legislature attempting to fill in a gap caused by a prior court ruling. By contrast, the abortion legislation enacted subsequent to *Roe* is largely an attempt to regulate abortions that have been legalized by the Supreme Court in *Roe*. Such legislation, which is designed to fill a need created by judicial invalidation of abortion prohibitions, cannot be fairly viewed as evidencing an intent to repeal prior prohibitions."[3]

In the recent case of *People v. Higuera,* 244 Mich. App. 429, 625 N.W.2d 444 (2001), a criminal defendant also advanced the argument that a pre-*Roe* abortion prohibition was impliedly repealed by post-*Roe* abortion regulatory laws. Higuera, a medical doctor specializing in obstetrics and gynecology, was charged with violating Michigan's criminal abortion statute (enacted in 1931) for allegedly inducing the abortion of a 28-week-old fetus. Defendant moved to dismiss based in part on the argument that the law in question had been impliedly repealed by the legislature's subsequent enactment of laws that regulated, rather than prohibited, abortions.[4]

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[3] Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without Roe: Applying the Doctrine of Implied Repeal to Abortion,* 11 St. Louis U. Pub. L. Rev. 385, 399 (1992).

[4] The subsequent legislative enactments defendant relied on were statutes requiring parental consent, informed consent, and record keeping,

The appellate court noted first the fact that in *People v. Bricker*, 389 Mich. 524, 208 N.W. 2d 172 (1973), the Michigan Supreme Court had construed the same statute to conform to the dictates of *Roe* and *Doe v. Bolton,* 410 U.S. 179 (1973). Rather than finding it irreconcilably unconstitutional under *Roe* and *Doe*, the Court upheld the1931 law by simply exempting pre-viability abortions from criminal prosecution while deeming post-viability abortions (except to save the life of the mother) to still be covered by the statute. The court of appeals took issue with defendant's assertion that the legislature had impliedly repealed this statute, holding, rather:

> "After *Bricker* was decided in 1973, the Legislature enacted various statutes regulating the performance of abortions . . . but did not revise MCL 750.14; MSA 28.204. The Legislature is presumed to be aware of the *Bricker* Court's interpretation of MCL 750.14; MSA 28.204, which construction permits abortions to be performed in accordance with *Roe.* (citations) We think it clear that in enacting those statutes after *Bricker*, the Legislature intended to regulate those abortions permitted by *Roe* and *Doe,* and *Bricker,* and did not intend to repeal the general prohibition of abortions to the extent permitted by the federal constitution, as construed by the United States Supreme Court. We thus must reject defendant's argument that MCL 750.14; MSA 28.204 has been repealed by implication." 244 Mich. App. at 436-37.

By the same token, the Texas regulatory statutes at issue here were enacted in consultation with the Texas Attorney General's 1974 opinion outlining the types of regulations permitted under the *Roe v. Wade* opinion.[5] Consequently, it should similarly be clear that the Texas Legislature "intended

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providing immunity for those who refuse to perform abortions, prohibiting partial-birth abortions, and prohibiting Medicaid funding for abortions. 244 Mich. App. at 435.

[5] Op. Tex. Att'y Gen. No. H-369 (1974), 4-13.

to regulate those abortions permitted by *Roe* and *Doe* and did not intend to repeal the general prohibition of abortions to the extent permitted by the federal constitution as construed by the United States Supreme Court." *Hignera, supra. See, also, Eppenauer, supra.*

B. There is no implied repeal when both enactments can be given effect.

Under Texas law, "for repeal by implication to occur, the implication must be clear, necessary, irresistible, and free from reasonable doubt." *Ramirez v. State*, 550 S.W. 2d 121, 124 (Tex. 1977), citing *International Service Ins. Co. v. Jackson*, 335 S.W. 2d 420 (Tex. Civ. App., Austin 1960). On the other hand, if an apparent conflict between two enactments can be resolved and both enactments given some area of operation and effect, no implied repeal will be found. In the present case, subsequent abortion regulations can be reconciled with prior abortion prohibitions because, even under the pre-*Roe* law, some abortions were legal and thus subject to being regulated. That is what distinguishes this case from *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990), relied on by the Fifth Circuit, where the statute at issue was deemed to allow no exceptions at all. As this commentator observed:

> "Under these almost unique circumstances [of a state's law providing no life-of-the-mother exception], an argument can be made that later regulatory provisions are in direct conflict, as the prior prohibition in theory left no legal activity to regulate. In the far more common instance in which the pre-*Roe* prohibition permitted legal abortions under some circumstances, subsequent regulations could be reconciled as a desire to regulate this class of legal abortions. That such a class of legal abortions might be very small would be irrelevant, given the presumption against implied repeal and the consequent command to avoid a finding of implied repeal when both

> statutes can be given *some* area of operation." [emphasis in original][6]

In finding an implied repeal, the Fifth Circuit thus ignored long-established rules of statutory construction. Unless there is a clear repugnance between the provisions of old and new statutes, "the duty of a court is to reconcile them and to construe both statutes so as to give effect to each." *Twin City Fire Ins. Co. v. Cortez,* 576 S.W.2d 786, 789 (Tex. 1978).[7]

A 1937 case involving a criminal defendant's challenge to a hunting law illustrates this principle at work. In *Wagers v. State*, 133 Tex. Crim. 420, 111 S.W.2d 714 (1937), the defendant appealed his conviction for killing a deer. He argued that a 1937 statute, which permitted the use of dogs in hunting, impliedly repealed the 1935 law under which he had been convicted, which mandated a five-year closed season for killing deer in the defendant's county of Montgomery. Defendant relied on language in the 1937 statute which provided, ". . . [I]t shall be lawful to use one dog for the purpose of hunting, pursuing, and taking of deer in . . . Montgomery . . . Count[y]." The court reconciled the seemingly inconsistent statutes by interpreting legislative intent to mean that the use of dogs is allowed only during those times that it is lawful to hunt deer in the named counties. In other words, *to the extent that hunting is allowed at all*, dogs may be used to hunt. So reconciled, the 1937 statute did not impliedly repeal the five-year hunting ban in Montgomery County. In the same way, the later-enacted regulatory provisions at issue in this case must be interpreted as embodying a legislative intent to regulate the practice of abortion, *to the extent that abortions are permitted at all.*

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[6] Smolin, *supra*, at pages 400-01.

[7] *Accord, Acker v. Texas Water Commission,* 790 S.W.2d 299, 301 (Tex. 1990), *Eppenauer v. Eppenauer, supra,* 831 S.W. 2d at 34. *See, also,* Tex. Gov't Code § 311.025.

The two seemingly contradictory sets of statutes may also be harmonized in another sense: *To the extent that the U.S. Constitution allows government to do so,* it is the Texas Legislature's intent to protect women from the dangers of abortion. In that connection, it will be recalled that the majority opinion in *Roe v. Wade* discussed the "three reasons [that] have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence." 410 U.S. at 147. The Court stated:

> "A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman . . . . Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." *Id.* at 148-49.

Based on an assumption that abortion had been made safe for women, *Roe* determined that Texas' laws outlawing all abortions except to save the life of the mother were overly intrusive when weighed against the risk of abortion's harm to women. As such, the laws were ruled unconstitutional. Although limited in scope, later-enacted regulatory laws are in harmony with pre-*Roe* abortion prohibitions by their consistency with the legislative purpose of protecting women from the hazards of abortion.

Lastly, the apparent inconsistency between present-day Texas laws regulating the practices and procedures of abortion clinics and pre-*Roe* provisions criminalizing abortion can be harmonized by the fact that the two statutory schemes were not intended to be in force *at the same time.* The present-day statutory scheme was enacted to fill a gap while the pre-*Roe* abortion statutes are held in abeyance until their constitutionality can be revisited. This situation is somewhat analogous to the fact that fish and game laws that completely

prohibit fishing and hunting during off seasons coexist with other laws providing for issuing fishing and hunting licenses. The seeming inconsistency is reconciled by the understanding that the two schemes are not intended to be enforced simultaneously. As Professor Smolin stated in his article addressing the issue at hand:

> "It is historically common throughout the law of abortion and the law generally, to prohibit an activity under certain circumstances, while permitting it with regulations in other circumstances. The Model Penal Code formulation on abortion is based on a combination of prohibitions with exceptions, and accompanying regulations applicable to the exceptions. Thus, given the presumption against implied repeal, it would be erroneous to conclude that a regulatory provision such as a parental involvement statute had impliedly repealed a prohibition containing exceptions."[8]

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[8] Smolin, *supra*, at 413.

CONCLUSION

The Fifth Circuit's dismissal of Petitioner's appeal was based solely on its finding that, "because the statutes declared unconstitutional in Roe have been repealed, McCorvey's 60(b) motion is moot." *McCorvey, supra,* 385 F.3d at 849. As the foregoing discussion amply demonstrates, the Court of Appeals' finding of implied repeal of the challenged laws is not only logically unsound but unsupported by the law of Texas and other jurisdictions. Since the laws in question have not been repealed, Petitioner's motion does present a live controversy that may—and should—be considered on the merits. The petition for a writ of *certiorari* should therefore be granted.

Respectfully submitted,

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No. 04-967

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In The Supreme Court of the United States

NORMA McCORVEY,
FORMERLY KNOWN AS JANE ROE,

Petitioner,

v.

BILL HILL, Dallas County District Attorney,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* JUSTINE M. KYKER IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE JUSTINE KYKER IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted in support of the petitioner.[1] By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae Justine Kyker ("Kyker") has a substantial interest in the disposition of this case. *Amicus Curiae* is a post-abortive woman physically and psychologically injured as a result of an abortion procedure.

SUMMARY OF THE ARGUMENT

Over the last thirty years, medical evidence and personal experiences have revealed that post-abortive women face a host of physical and psychological complications, risks, and by-products from the abortion procedure. Women endure emotional, spiritual, relational, psychological, and physical ramifications post abortion that were not fully contemplated nor explored by this Court in *Roe*. Kyker's own personal experience and the experience of the other post-abortive woman who submitted affidavits to the

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any other person other than *amici curiae*, their members, and their counsel.

District Court evidences the medically harmful consequences of this procedure. The thoughtful legal and analytical ideal in *Roe v. Wade*, 410 U.S. 113 (1973) of a protective blanket existing by virtue of a woman's carefully considered decision made in the informative sanctity of a physician-patient relationship has been merely an ideal.

ARGUMENT

Amicus Curiae, Justine Kyker ("Kyker"), respectively submits this brief in support of the Petitioner. Kyker submits that her personal experience with abortion supports Petitioner's contention that abortion harms women. The resulting harm to women from abortion was not generally known at the time the Court originally decided this case. This changed understanding of the actual results of abortion with respect to the women that have them warrants reconsideration of *Roe v. Wade*, 410 U.S. 113 (1973).

A. Kyker's Experience With Abortion And Its Aftermath.

For this Court to fully appreciate and understand Kyker's position herein, Kyker submits that it is essential for this Court to understand Kyker's personal experience and story underlying her prayer that this Court grant the Petition, to wit:

> My name is Justine M. Kyker, I am the thirty-five year old married mother of an eight-year-old girl and a five-year-old boy. My story is more painful than I can bear. On May 3, 1988, I went

to Planned Parenthood in Fort Dodge, Iowa, to obtain birth control pills. As a nineteen-year-old college student in a steady relationship, I trusted Planned Parenthood to protect my sexual health. On June 29, 1988, I went back to Planned Parenthood of Fort Dodge as my period was two weeks late. They performed a pregnancy test and said it was negative. They sent me home armed with additional protection of condoms and foam. By mid-August, 1988, I could no longer deny I was pregnant. I had not had a period for three months. I was home for the summer so I went to our family physician. He confirmed my fear. I was pregnant. My physician showed me pictures of couples wanting to adopt a newborn baby. I decided then I wanted to place my baby for adoption and told my family and friends of my plans.

During the Fall of my pregnancy, I moved to a large urban area away from my family. Under intense pressure from the father of my child and my closest friend, I decided to contact Planned Parenthood to obtain information on abortion. When I called their office, the receptionist asked me how far along I was in the pregnancy. When I said three months, she told me I needed to come in right away and scheduled an appointment for me the next morning. I was told to bring $200.00 cash.

At my initial session with a staff member, she said, "you seem sad." With that I started to cry. The staff member gave me a white pill and said "take this, it will make you feel better." I do not remember them calling my name or how I even got on the abortionist's table. The friend who took me to have the abortion said I was snoring while in the waiting room. The next thing I can remember was being jolted back to consciousness

when I heard and felt the abortionist's vacuum rip my baby from my body. I remember screaming loudly. Employees scrambled in from nowhere to get in my face and yell at me to "take deep breaths." I felt like every organ in my body was being ripped inside out from the suction. While the actual abortion took minutes, it was the beginning of flashbacks and physical reactions that continue to this day. The whole staff, including the Doctor, scrambled out of the door as soon as the abortion procedure was finished. There was a pool of blood underneath me. I was vomiting in the recovery room. The only support I received afterwards was from the other girls in the recovery room who just aborted their babies. No other support was offered and I never met, either before, during, or after the procedure, my abortionist.

Planned Parenthood did not tell me how far along I was. Based on my LMP of May 15 to the date of the abortion, September 1, 1988, I should have been sixteen weeks gestation. My baby was already formed with all organs in place. Planned Parenthood did not tell me this. I thought it was just a blob with a heartbeat. I felt immediate relief that my "problem" pregnancy was over. This relief soon turned to horror when soon after the abortion I was passing greyish clots that looked like dead flesh. Terrified that I may have been looking at a small hand or foot, I flushed the grey clots down the toilet. This was the beginning of the denial and severe depression that would plague me for years.

The impact of my abortion was devastating. I did not realize the full effects of this procedure on me physically, psychologically, emotionally, relationally, or spiritually until several years later.

My new boyfriend, who was not the child's Father, was disgusted that I had chosen abortion and said he didn't want to see me anymore. My relationship with my own father has been strained.

The physical problems started with the birth of my first child in 1996. I suffered an abruption of the placenta which caused excessive bleeding and required an emergency C-section.

With my next pregnancy in May, 1998, I had an ectopic pregnancy which caused me to lose this child. An ectopic pregnancy can occur when there has been previous scarring due to infection, or in my case, abortion. I had no idea I was at greater risk for ectopic pregnancies by having an abortion. I was not informed. As I was lying on the operating room table before the surgery to remove my ectopic pregnancy (the child was implanted in my fallopian tube), I had nightmarish flashbacks of the abortion. I kept thinking that my baby is alive, but when I wake up, my baby will be dead. Then the anesthesia started kicking in. The nurse told me as I was slipping out of consciousness "there is only one thing you need to do, breathe." This took the life of my child and I suffered the loss of a fallopian tube after a painful laparoscopy procedure.

In July, 1998, I was again pregnant, but lost this child to a miscarriage.

My second child was also born by C-section in 1999. My cervix never dilated past 1 cm in either pregnancy. Planned Parenthood never informed me that my future pregnancies may be affected by my abortion procedure. I simply had no idea.

> When I was twenty-nine, I had a benign tumor removed from my left breast. I now undergo routine mammograms due to my increased susceptibility to breast cancer as a result of my abortion. Again, no one ever told me this could happen.
>
> Psychologically, I have been devastated. I suffer from depression, which at times is severe and disabling, especially near the anniversary of the abortion and my baby's death. What was presented to me as a lump of tissue by Planned Parenthood was actually a child for whose death I am responsible. I just had no idea. No one said a word.
>
> Abortion and the psychological trauma is more than a medical phrase to me, it is the burden my soul must bear. I had a dream several years ago that shook me to my core and has remained with me always. I was driving a car on a road alone when a woman, a man, and a young girl suddenly appeared and started to cross the road in front of me. I couldn't stop. The man and woman got out of the way, but not the girl. She turned and looked into my eyes at impact. She was my aborted daughter.

This experience is not uncommon. Clearly, since *Roe*, there have been developments and recognition of abortion related trauma never contemplated by this Court at the time of *Roe*. The reality of abortion and abortion as it was considered at the time of *Roe* has been proven over the last thirty years to be drastically different. The woman's right to choose as supported by her treating physician within the confines of a healthy patient-physician relationship as contemplated in *Roe* is not the reality for most women. The proposition that abortion is a safe and healthy option for pregnant women has been proven incorrect.

B. The Court's Decision In *Roe* Was Based, In Substantial Part, On The Purported Existence Of A Physician-Patient Relationship And The Attendant Benefits Thereof.

In *Roe*, this Court found it relevant to consider the "history of abortion, for such insight as that history may afford us. . . ." *Roe*, 410 U.S. at 129. In this Court's historical review, the Court found that the physician's Hippocratic Oath "[r]epresents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day." *Id.* at 131. While further considering statutory precedent from both our own judicial history as well as that of English statutory law, the Court focused considerable energy upon the basis and position of the American Medical Association and the American Public Health Association.

The American Medical Association (hereinafter "AMA") policy received considerable attention from this Court recognizing the AMA shift in policy and position from June, 1967 to June, 1970. *Roe*, 410 U.S. at 142, 143. The adopted 1967 policy, as stated in *Roe*, was "[o]pposition to induced abortion, except when there is 'documented medical evidence' of a threat to the health or life of the mother, or that the child 'may be born with incapacitating physical deformity or mental deficiency,' or that a pregnancy 'resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the patient,' two other physicians 'chosen because of their recognized competence have examined the patient and have concurred in writing,' and the procedure 'is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.'" *Id.*

This Court noted in *Roe* the significant shift that occurred in 1970. The AMA's policy became focused upon best interests of the patient, sound clinical judgment, and informed patient consent. *Id.* at 143. This court further noted the resolutions or policy of the AMA was that the abortion was a "medical procedure" and should be performed by a licensed physician in an accredited hospital and after consulting two other physicians. *Id.*

This court further considered the opinion of the American Public Health Association (hereinafter "APHA") and specifically considered in *Roe* the position of the APHA and the Standards for Abortion Services as adopted by their Executive Board in October, 1970. *Id.* at 144, 145. Specifically, there were five APHA "standards" considered by this Court which are of particular interest and concern herein.

First of all, this Court noted one of the five APHA standards which stated that "'An important function of counselling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.'" *Id.* at 145. This Court further recognized an additional "standard" of the APHA that "'Psychiatric consultation should not be mandatory.'" *Id.* at 145. In addition, these services should be considered specialized and not offered on a routine basis. *Id.* The final APHA "standard" of particular interest stated "'A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.'" *Id.*

The afore-referenced considerations of this Court served as the very elements and foundation for this Court's holding in *Roe*. Interestingly, a common thread in

this Court's foundational consideration of the Hippocratic Oath, the AMA policies – both in 1967 and in 1970, and the APHA policy and standards of October, 1970, are the use of the terms "patient, physician, and medical procedure." Clearly, inherent in the consideration of the Hippocratic Oath is the recognition of a physician and patient relationship.

In the AMA's policies of both 1967 and 1970, again, inherent in this foundational consideration in *Roe* is a patient and physician relationship and consideration of an abortion as a medical procedure. Even the APHA policy recognized that "at present abortions should be performed by licensed physicians or osteopaths who are licensed to practice and who have 'adequate training.'" *Id.* at 146.

C. The Reality Of Abortion As Practiced Today Does Not Include A Physician-Patient Relationship.

In Kyker's case (which is not atypical if one considers the hundreds of affidavits submitted by Petitioner to the District Court), this physician-patient relationship as contemplated by the Hippocratic Oath, the AMA, and the APHA was never established. When Kyker presented at Planned Parenthood for consultation, neither before, during, nor after the procedure did Kyker meet the physician or abortionist. No consultation occurred with the treating physician to discuss the procedure, the alternatives to the procedure, to address patient questions or concerns, or for explanation or discussion of the risks of the procedure.

The Hippocratic Oath itself and both past and present AMA policies clearly contemplate that a patient-physician relationship be established and that the woman's decision

be made as a product of this relationship after careful consideration. This assumption was not the reality for Kyker. The thoughtful legal and analytical ideal in *Roe* of a protective blanket existing by virtue of a women's carefully considered decision made in the informative sanctity of a physician-patient relationship has been merely an ideal.

Reality, for Kyker and for others, has been an outpatient procedure in an environment that is not a traditional medical environment with consultation with a respected physician and a scheduled procedure for a subsequent date. The process instead has consisted of a one-stop process with no physician contact with the patient, limited disclosure, if any, of the physical, emotional, spiritual, and psychological ramifications of the procedure, and encouragement for an immediate response to the situation.

For Kyker, there was no meaningful therapy or counseling and absolutely no physician consultation prior to the procedure. Kyker met with non-physician staff, was medicated with what was believed to be a sedative by its effect upon Kyker, and pre-procedure counseling which entailed a five-minute meeting with a staff person who stated, "you look sad." For Kyker, the primary party to provide post-abortion counseling were the other "patients" at the facility.

Unfortunately for Kyker, the "wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors" as contemplated by the APHA in their October, 1970, Standards for Abortion Services were again an unrealistic and an unrealized ideal with the reality for Kyker being an outpatient procedure conducted at a "volume" facility

with no physician interaction and no "sympathetic volunteer" as contemplated by the APHA. *Id.* at 145.

In the context of considering whether a woman's decision whether or not to terminate her pregnancy was a protected right to privacy, this Court stated:

> This right to privacy, whether it can be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendments reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the state would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by childcare. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Roe, 410 U.S. at 153.

Once again, these findings envision pregnancy as a thoughtful consideration between patient and physician as "all of these are factors the woman and her responsible

physician necessarily will consider in consultation." *Id.* Reality has proven to be quite different. With Kyker, failure to provide any contact between the nineteen-year-old woman and her "physician" deprived her of this necessary consultation.

D. The Court's Decision In *Roe* Did Not Adequately Consider The Psychological Impact Of The Abortion Procedure On Women.

Although this Court's opinion in *Roe* considered the psychological impact of abortion, it was from the perspective of the impact on a woman seeking an abortion and abortion being unavailable. There was little, if any, consideration of the psychological implications *of actually having the abortion procedure.*

Kyker has been psychologically ravaged by her decision, which was not supported by the counseling and physician-patient relationship as *Roe* contemplates. Severe depression, in particular at the "anniversary date" of her procedure, has been a realized trauma for Kyker. Kyker's experience was the grief of child loss accompanied by the guilt of being the individual who made the uninformed decision. While post abortion counseling aided in cop .g and acceptance nearly ten years post procedure, the knowledge and consideration of the risks and by-products of the procedure were not made available nor disclosed by Planned Parenthood or its staff. Quite simply, this procedure was harmful to Kyker.

E. The Court's Decision In *Roe* Did Not Adequately Consider The Physiological Impact Of The Abortion Procedure On Women.

The consideration by this Court of "specific and direct harm medically diagnosable even early in pregnancy" also did not contemplate the actual physiological harm of the procedure itself on women. *Id.* at 153. It was not disclosed to Kyker that a documented risk for post abortive women is a greater risk of breast cancer than that of non-post abortive women. Kyker realized this risk when at age twenty-nine a benign tumor was removed from her left breast. This was another health risk to which Kyker was unknowingly subjected. Clearly, this constitutes "medical harm."

In addition, Kyker submits that her two children were born by virtue of a C-section procedure because of her cervix being damaged in the abortion procedure. Kyker's first child required an emergency C-section resulting from an abruption of the placenta. An additional pregnancy was an ectopic pregnancy as the fetus implanted in her fallopian tube. The condition was potentially life threatening and required a painful laparoscopy procedure. The result was the loss of the child and the removal of a fallopian tube. It was not disclosed to Kyker that an ectopic pregnancy can result from previous scarring caused by infection or abortion. Kyker was not informed that abortion placed her at greater risk for subsequent ectopic pregnancies. Clearly, this constitutes "medical harm."

F. Kyker's Experience, And The Experience Of The Post-Abortive Women Who Submitted Affidavits To The District Court, Demonstrates That The Court's Decision In *Roe* Was Based Upon An Incomplete Understanding Of The Ramifications Of The Abortion Procedure On Women.

The careful analytical consideration of *Roe* was premised upon facts, policies, and educated opinions as known and presented to this Court thirty years ago. The emotional, psychological, spiritual, relational, and physiological ramifications of this procedure were not fully known nor developed at the time of *Roe*.

As evidenced herein, significant emotional, psychological, relational, spiritual, and physiological ramifications were the by-products of Kyker's procedure. Kyker, consistent with the hundreds of other post-abortive women who submitted affidavits to the District Court in this case, has suffered from all of the above-mentioned trauma. The relevance is that with no disclosure of these risks and by-products of an abortion procedure coupled with Kyker having no patient-physician consultation, Kyker did not make an informed decision nor was she cognizant of the multiple ways in which abortion is harmful to women.

In *Roe*, this Court stated that "Modern techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe." *Roe*, 410 U.S. at 163. Kyker's own experience supports the conclusion that the assumption that abortion is now relatively safe was based upon incorrect and incomplete information available at the time this Court addressed *Roe*.

Upon review of *Roe*, no consideration of the above-mentioned health risks were contemplated and considered. The health information available at the time of *Roe* and as presented to this court when initially considering *Roe* appears vastly different than what we now know and have available today. Kyker's story is merely one example of how one woman was physically and psychologically ravaged by this procedure. The emotional, psychological, relational, physiological, and spiritual ramifications experienced by Kyker still remain.

From review of *Roe*, it appears that the extent of the risks and post-abortive ramifications were either unknown or not fully developed. The consideration of the Hippocratic Oath, the AMA policies, and the APHA standards and policies as contemplated in *Roe* did not encompass the health concerns and risks actually experienced by post-abortive women known today.

Over the course of the last thirty years, medical evidence and personal experiences have revealed that post-abortive women face a host of complications, risks, and by-products from an abortion procedure. As aforestated herein, the emotional, spiritual, relational, psychological, and physical ramifications were not fully contemplated nor explored by this Court in *Roe*. Kyker's own personal experience, and the experience of the other post-abortive women who submitted affidavits to the District Court, evidences the medically harmful consequences of this procedure.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 04-967

In The

Supreme Court of the United States

October Term 2004

NORMA McCORVEY,
FORMERLY KNOWN AS JANE ROE,
Petitioner,

v.

BILL HILL, Dallas County District Attorney,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONER With Appendix

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BRIEF OF AMICUS CURIAE LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

Amicus Curiae[1] has a substantial interest in the disposition of this case. Life Legal Defense Foundation, (LLDF) is a California not-for-profit corporation, founded in 1989 for the purpose of defending the rights of the unborn and their advocates, particularly by providing them with a trained and committed voice in the courtrooms of our Nation. LLDF has created a network of hundreds of volunteer attorneys and laymen across the country for that purpose.

LLDF is committed to the defense of the unborn. This case provides the Court with an opportunity to review its analysis and approach to the issue of abortion in a landscape totally different than when it first decided the case of *Roe v. Wade,* in 1973. There is new legislation called Safe Haven laws, which provides a viable alternative to women who can now abandon their baby without criminal prosecution. There are laws protecting a baby born alive after an abortion. There is scientific technology providing 3-D images detailing the development of an unborn child that was not available to this Court in 1973.

The Nation awaits this Court's review of this controversial issue based upon the current landscape. The LLDF urges this Court to review its decision in light of a new day.

SUMMARY OF REASONS FOR GRANTING CERITIORARI

1. This Court should grant certiorari, as Texas did not repeal its abortion ban by implication.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* state that the brief was prepared in its entirety by *amicus curiae* and its counsel. No monetary contribution toward the preparation or submission of this brief was made by any other person other than *amicus curiae*, its members, and its counsel.

Abortion regulations by themselves do not automatically repeal abortion bans. This Court should look to the type of regulations themselves to determine if they are irreconcilable with the State's prior abortion ban. The regulations in Texas are not. Rather, these regulations are in line with the position of Texas prior to this Court's decision in *Roe v. Wade*. This case is not moot.

2. The legal and factual landscape concerning abortion has changed. Since 1973, forty-six (46) states have enacted Safe Haven laws to provide a different approach to an unwanted pregnancy. Now, women may safely abandon their baby and the state will assume the burden of rearing the child. Other states have enacted Born Alive legislation protecting babies who survive the abortion procedure. Technology has advanced greatly, providing a 3-D view into the development of the unborn. This Court now has before it a landscape unimaginable 32 years ago. It is time for this Court to address these changes.

REASONS FOR GRANTING CERITIORARI

I.

TEXAS DID NOT REPEAL ITS ABORTION BAN BY IMPLICATION. THEREFORE, THIS CASE IS NOT MOOT.

The Fifth Circuit in *McCorvey v. Hill*, 385 F.3d 846, (5th Cir. 2004), *petition for cert. filed*, 2005 WL 123452, (No. 04-967), in reviewing the mootness doctrine cited the following, "[s]uits regarding the constitutionality of statutes become moot once the statute is repealed."[2] *See page 4 of Opinion.* The critical question is whether Texas has in fact repealed its statutes banning abortion. Clearly, the Fifth Circuit in *McCorvey*, believed Texas had done so by implication.

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[2] *Id.* at page 4.

The Fifth Circuit in *McCorvey* used the fact that Texas has regulated abortion since this Court's decision in *Roe*[3] to support its position that Texas had repealed its abortion ban by implication. Amicus submit that the fact a state regulates abortion does not necessary mean it has repealed its abortion ban. Rather, the issue should be analyzed under the framework of whether its regulations are irreconcilable with its prior abortion ban. Regulations that are restrictions on abortion are not irreconcilable with a prior ban on abortions. Such is the case with Texas. The regulations cited to by the Fifth Circuit involve restricting minors access to abortion, regulating the licensing of abortion clinics, and restricting government funding of abortions. These regulations are not irreconcilable with Texas' dormant ban on abortion unless necessary to safe the life of the mother.

This distinction in analysis of post-*Roe* regulations is addressed in the article *What If Roe Fell? The State-by-State Consequences of Overturning Roe v. Wade.*[4] In her analysis, the author gives the following example:

However, this determination is often not so clear-cut. For example, many states have enacted restrictions on abortions that are permitted in the state—such as a requirement that woman wait 24 hours after receiving certain state-scripted and biased information before obtaining an abortion rather than passing a statute affirmatively setting for the conditions under which abortions are permitted. In this situation, a court could decide that these later-enacted statues were not irreconcilable with an earlier ban statute by interpreting the mandatory delay/biased counseling law as a regulation on the few abortions that might be allowed under the ban statute. For example, if the

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[3] *Roe v. Wade*, 410 U.S. 113 (1973).

[4] Center for Reproductive Rights, September 2004, pg 9, *at* www.reproductiverights.org (last visited Jan. 27, 2005).

ban allowed abortions to save the woman's life, the court could interpret the mandatory delay law as regulating those few abortions performed to save the woman's life, not as an indication that additional abortions were allowed. Under this reasoning, an abortion ban would not be viewed as irreconcilable, and therefore might be considered enforceable. (internal quotation omitted)

Amicus submits that the Texas regulations fall in line with this example and should be interpreted as such by this Court.

Contrast this approach with the position taken in Oregon. The Oregon Supreme Court in *State of Oregon v. Clowes*, 310 Or. 686, 801 P.2d 789, 796 (1990) reviewed the status of Oregon's abortion law:

The Oregon legislature made a deliberate value decision when, in 1983, as previously discussed, it repealed the Oregon statutes that restricted a woman's right to terminate her pregnancy and enacted law that assumes abortions will be performed.

If this had been the state of affairs in Texas concerning its abortion laws, the position of the Fifth Circuit would be without fault. Unfortunately, it was not. Rather, the Fifth Circuit's position that since Texas regulates the availability and conditions for abortion it repealed its ban by implication, is too expansive an interpretation to support the application of the mootness doctrine, especially with an issue of nationwide importance.

II.

THE MAGNITUDE OF PUBLIC POLICY AT ISSUE HERE REACHES NATIONWIDE. SAFE HAVEN LAWS A/K/A BABY MOSES LAWS ARE NOW STATUTORY IN FORTY-SIX (46) STATES, THUS RELIEVING WOMEN OF THE BURDEN OF CHILD REARING AND PROTECTING THE STATE'S INTEREST IN LIFE.

Consider the story of Veronica.[5] Veronica was a young single woman, age 22, uncommitted, and ready to embark on a new life as she left her hometown searching for success. Would she return to college for a degree? Would she begin a new career? She had everything going for her...everything except a pregnancy by the man she left behind. What was Veronica to do?

She turned to a local woman's clinic for guidance. There she was told that she had no other choice but to "take care of the problem" as she was unemployed, young, single, and not ready for the burden that raising a child would put on her life. Was the counselor right? Could she handle the burden of this child? She never considered abortion in the past. However, if she chose adoption, would the child one day locate and confront her? What other choice did Veronica have?

Today, Veronica, and women just like her throughout the United States do have another alternative. Women now have the option of avoiding the abortion procedure and the harms that go along with it, leave behind the fear that an adopted child may later confront them without being forced to bear the burden of caring for an "unwanted" child.

Beginning in the year 2000, Texas enacted a new body of law that has been described as a Safe Haven or "Baby Moses" law.[6] This law allows a woman to safely abandon her child at a specified location without fear of prosecution. The State itself chose to take on the responsibility of caring for and locating a loving home for the child.

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[5] The woman described in this story has chosen to remain confidential. As such, her name been changed to "Veronica" in an effort to protect her identity.

[6] "Led by Texas State Representative Geanie W. Morrison, the Safe Haven legislation was proposed to address two important issues. First, it was proposed to significantly reduce the risk of a newborn being abandoned in a dangerous environment that may result in death. Second, the legislation was proposed to protect mothers who feel as if they have no other option besides abandonment, but

Soon after, other states began considering the issue of how to promote life and provide an avenue for a pregnant woman to deliver her baby, yet not be required to bear the burden of raising the child. To date, forty-six (46) states [7], comprising 92% of the states across the Nation, have crafted some form of these laws and are willing to completely relieve women of the burden of caring for an "unwanted" child. [8] The result of such legislation is twofold, the woman is not burdened with unwanted childrearing and the child is provided for. Counsel for Amicus has reviewed each of these statutes. A brief summary of the approach taken by these statutes follows.

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who might be willing to safely deliver their newborn to a safe haven." Dayna R. Cooper, *Fathers Are Parents Too: Challenging Safe Haven Laws With Procedural Due Process* 31 Hofstra L. Rev. 877, 879, Spring (2003).

[7] *See* ALA. CODE § 26-25-1 *et seq.* (2000); ARIZ. REV. STAT. § 13-3623.01 (2001); ARK. CODE ANN. § 9-34-202 (Michie 2001); CAL. HEALTH & SAFETY CODE § 1255.7 (Deering 2000); COLO. REV. STAT. § 19-3-304.5 (2000); CONN. GEN. STAT. § 17a-57 *et seq.* (2000); DEL. CODE ANN. tit. 16 § 907A (2001); FLA. STAT. ANN. § 383.50 *et seq.* (West 2000); GA. CODE ANN. § 19-10A-1 *et seq.* (2002); IDAHO CODE § 39-8201 *et seq.* (2001); § 383.50 ILL. COMP. STAT. 2/1 *et seq.* (West 2001); IND. CODE Ann. § 31-34-2.5-1 *et seq.* (Michie 2000); IOWA CODE § 233.1 *et seq.* (2001); KAN. STAT. ANN. § 38-15,100 (2000); KY. REV. STAT. ANN. § 405.075 (Michie 2002); LA. CH. CODE art. 1701 *et seq.* (West 2000); ME. REV. STAT. ANN. tit. 17-A § 553 (West 2002); MD. CODE ANN. CTS. & JUD. PROC. § 5-641 (2002); MASS. GEN. LAWS ch. 119, § 391/2 (2004); MICH. COMP. LAWS § 750.135 (2000); MINN. STAT. § 145.902 (2000); MISS. CODE ANN. § 43-15-201 *et seq.* (2001); MO. REV. STAT. § 210.950 (2002); MONT. CODE ANN. § 40-6-401 *et seq.* (2001) ; NEV. REV. STAT. ANN. § 432B (2001); N.H. REV. STAT. ANN. § 132-A *et seq.* (2003); N.J. STAT. ANN. § 30:4C-15.5 *et seq.* (West 2000); N.M. STAT. ANN. §§ 24-22-2 et seq. and 30-6-1 (Michie 2001); N.Y. PENAL § 260.03; PENAL § 260.15; and, SOC. SERV. § 372-g (2000) ; N.C. GEN. STAT. § 7B-500 (2001); N.D. CENT. CODE § 50-25.1-15 (2001); OHIO REV. CODE ANN. § 2151.3515 *et seq.* (Anderson 2001); OKLA. STAT. tit. 10 § 7115.1 (2001); OR. REV.

In general, there are two basic approaches taken by the individual states as they consider the issue of child abandonment. The first approach started by Texas and followed by Alabama, Arizona, Arkansas, Delaware, Indiana, Michigan, Mississippi, Missouri, New Jersey, New York, Oregon, Utah, and West Virginia, is to provide for an affirmative defense for any potential charges for child abandonment. If the child is unharmed, then the mother can use this defense. The majority of the remaining states provide for immunity from any charges for child abandonment. The latter approach provides for greater anonymity, as the mother does not have to fear having to publicly defend herself against criminal charges at some later date. Many of these states confirm that this is their purpose in their enacting legislature.[9]

STAT. § 418.017 (2001); PA. STAT. ANN. tit. 23 § 6501 *et seq.* (West 2002); R.I. GEN. LAWS § 23-13.1-1 *et seq.* (2001); S.C. CODE ANN. § 20-7-85 (Law. Co-op. 2000); S.D. CODIFIED LAWS § 25-5A-27 *et seq.* (Michie 2001); TENN. CODE ANN. § 68-11-255 (2001); TEX. FAM. CODE ANN. § 262.301 *et seq.* (West 1999); UTAH CODE ANN. § 62A-4a-801 *et seq.* (2001); VA. CODE. ANN. § 18.2-371.1 (Michie 2003); WASH. REV. CODE § 13.34.360 (2002); W. VA. CODE § 49-6E-1 *et seq.* (2000); WIS. STAT. ANN. § 48.195 (West 2001); WYO. STAT. ANN. § 14-11-101 *et seq.* (Michie 2003).

[8] Many states allow different time periods in which a woman is able to safely abandon the child without fear of prosecution. For example in Texas, the woman is given sixty (60) days to leave the child at a safe location without questions asked; in Florida, the time period is shortened to 3 days. The state of North Dakota provides for the longest period of one year during which a mother may safely abandon her baby. North Dakota also provides for immunity for such action.

[9] *See, e.g.*, Louisiana Statutes La. Ch. C. art. 1149 "The purpose of this Chapter is to provide a mechanism whereby any parent may relinquish the care of an infant to the state in safety, anonymity, and without fear or prosecution."

In 2001, the Oregon legislature followed in Texas' footsteps by enacting legislation to allow a parent to anonymously leave an infant at an authorized facility.[10] In fact, legislative history to this bill recognized Texas as the pioneer in this area. Testimony was presented that California followed Texas in 2000.[11] Testimony was also presented that Oregon's bill was even more comprehensive than California's. Oregon added more locations as drop-off points such as police and fire stations.[12] Senator Peter Courtney, Vice-Chair of the committee reviewing Oregon's proposed bill testified that the purpose of this bill was to provide a means to those mothers or fathers who do not want their baby, who have hidden or denied the pregnancy or who cannot bear the shame or struggle a baby would impose.[13] Further testimony provided by Dr. Grant Higginson, Acting Administrator, Health Division, Oregon Department of Human Services stated succinctly the State's interest in saving one child would be considered a "true success."[14] A website for reviewing the legislative history of Oregon's Baby Moses law is provided below.[15]

Oregon and the majority of the remaining states have accepted the burden associated with raising a child. Unfortunately, this change did not begin until 2000. Clearly, this is a significant change in the legal landscape since 1973, and is relevant to Petitioner's Rule 60 motion. The Court in *Roe v. Wade* expressed

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[10] *See* OR. REV. STAT. § 418.017 (2001), Appendix, page A1.

[11] *See* Testimony of Debbie Ferris, Garden of Angels, Safe Arms for Newborns, Senate Committee on Judiciary, March 1, 2001, Tape 49 A, SB 199.

[12] *See* Testimony of Vice-Chair Senator Peter Courtney, Senate Committee on Judiciary, March 1, 2001, Tape 49 A, SB 199.

[13] *Id.*

[14] *See* Testimony of Dr. Grant Higginson, Senate Committee on Judiciary, March 1, 2001, Tape 50 A, SB 199.

[15] http://arcweb.sos.state.or.us/legislative/legislativeminutes/01legisweb/s/jud/SJUD03~1.htm.

its concern for the burden placed upon women if abortion was not available.

Maternity, or additional off-spring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable psychologically and otherwise, to care for it.[16]

In 1973, the Supreme Court could not envision that the states would take the responsibility of the care of the child without repercussions on the woman. Now, in forty-six states, a pregnant woman can leave her infant at various locations such as a physician's office, hospital, fire station, sheriff's office or police station. The family unit is not forced to deal with an "unwanted child." Rather, the state will accept this burden. The parent cannot be convicted of child abandonment as long as abuse is not involved.[17]

III.

THE STATE'S PUBLIC POLICY IN PROTECTING LIFE IS EXPRESSED THROUGH ITS SAFE HAVEN LAWS

This Court in *Roe* recognized the state's competing interest in potential life. It stated:

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[16] *Roe*, *supra* at 153.

[17] OR. REV. STAT. § 163.535, Abandonment of a child, is an example of such language.

(3) It is an affirmative defense to a charge of violating subsection (1) of this section that the child was left in accordance with ORS 418.017.

> As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision.[18]

Later in the same opinion, this Court defined when the state's interest becomes compelling.

> "With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."[19]

A significant change in the last five years is that forty-six states have established the policy of providing life for unwanted babies and relieving the mother of the shame associated with abandoning their child.[20]

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[18] *Roe, supra,* at 154.

[19] *Roe, supra,* 163-64.

[20] "Indiana has an interest in protecting its children. The mother abandoning her child with an emergency medical services provider does so because she feels that abandoning the child is in the best interest of the child. The interest in the welfare of children, shared by the state and the mother who chooses to leave her baby with an emergency medical services provider, can be furthered without punishing the mother for the abandonment." Jill M. Acklin, *Choosing Life: Proposing Immunity for Mothers Who Abandon Their Newborns,* 35 Ind. L. Rev. 569, 590 (2002)

Examples of how the different states addressed this public policy can be found in many of the enacting statutes. The State of Illinois for example stated in its Abandoned Newborn Infant Protection Act:[21]

It is recognized that establishing an adoption plan is preferable to relinquishing a child using the procedures outlined in this Act, but to reduce the chance of injury to a newborn infant, this Act provides a safer alternative.

A public information campaign on this delicate issue shall be implemented to encourage parents considering abandonment of their newborn child to relinquish the child under the procedures outlined in this Act, to choose a traditional adoption plan, or to parent a child themselves rather than place the newborn infant in harm's way.

The state of Delaware stated its public policy this way[22]:

> "(a) The General Assembly finds and declares that the abandonment of a baby is an irresponsible act by parent(s) and places the baby at risk of injury or death from exposure, actions by other individuals, and harm from animals. However, the General Assembly does recognize that delivering a live baby to a safe place is far preferable to a baby killed or abandoned by the parent(s)."

As part of their education outreach on this issue, public health programs in the various states create brochures and posters providing information on their Safe Haven laws. California for example includes the following language in their public posters, "Safely Surrendered Baby, no shame, no blame, no names."[23]

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[21] § 325 ILCS 2/5.015 S13.

[22] 16 Del. C. § 907A.

[23] *See* http://www.dss.cahwnet.gov/cdssweb/SafelySurr_91st.htm (last visited Jan. 27, 2005).

The state's interest in protecting life is established to a greater degree in the State of Michigan. Not only does the State of Michigan provide a safe haven for unwanted babies, it also protects the lives of newborns who survive an abortion procedure. Entitled the "Born Alive Infant Protection Act" the State establishes its public policy in this area as follows:[24]

AN ACT to assert the state's interest in protecting all individuals; and to prescribe responsibilities and procedures in regard to a newborn whose live birth results from an abortion.

The State of Michigan solidifies its public policy with the following legislative findings:[25]

Sec. 2. The legislature finds all of the following:

The state has a paramount interest in protecting all individuals.

If an abortion results in the live birth of a newborn, the newborn is a legal person for all purposes under the law.

A woman's right to terminate pregnancy ends when the pregnancy is terminated. It is not an infringement on a woman's right to terminate her pregnancy for the state to assert its interest in protecting a newborn whose live birth occurs as the result of an abortion.

Forty-six states have chosen to adopt laws reflecting the public policy of life. These states have enacted laws to provide an alternative approach to an unwanted pregnancy. This approach was unheard of in 1973, and dramatically changes the factual and legal landscape upon which *Roe v. Wade* currently rests. The legal and social landscape has changed. It is time for this Court to review *Roe v. Wade* in light of these changed factual and legal conditions.

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[24] MCLS prec § 333.1071.

[25] MCLS § 333.1072.

A. SAFE HAVEN LAWS ARE SUCCESSFUL ACROSS THE NATION.

Texas' safe haven law and similar legislation across our Nation are being utilized successfully. Thus, many women are now exercising the option of anonymously relieving themselves of the childrearing burden while simultaneously providing for the safety of the child. Statistics in this regard are difficult to obtain as a woman who chooses to abandon a child under the protection of safe haven laws may remain anonymous. However, in an effort to demonstrate to this Court the success of Safe Haven laws, the following summary is provided.

Statistics from only 33 of the 46 of the states with Safe Haven legislation in place reflect that 295 infants have been safely abandoned within those states over the past 5 years.[26] The National Council for Adoption reports:

> "[a]fter initial presentation of these newborns at Safe Havens, approximately one third were placed for adoption by parents through the usual process; one third remained Safe Haven babies and were placed for adoption, with the parents maintaining their anonymity as allowed under the law; and one third were reunited with their parents who changed their mind and decided to parent."[27]

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[26] National Council for Adoption, *Kids at Heart: Popeye to Adopt Swee'Pea During National Adoption Month*, National Adoption Report, page 5, Fall 2004, *available at* www.ncfa-usa.org/pub_NAR.htm (last visited Jan. 9, 2005). The National Council for Adoption supports Safe Haven legislation "...so desperate mothers can place their children safely and legally with authorized caregivers rather than abandoning them or worse." *See* www.ncfa-usa.org/about_Mission.htm (last visited Jan. 9, 2005).

[27] *Id.*

In Florida alone, twenty-two (22) newborn children have been safely abandoned since the enactment of the State's Safe Haven law 2000.[28] One of the twenty-two was a baby boy, just a few hours old, who was left in an emergency room.[29] As there was no evidence of abuse, the mother was not pursued by the State for abandonment.[30] The child was placed into the state foster care system and made available for adoption.[31]

Another baby boy was abandoned under Florida's Safe Haven law on April 6, 2003. A woman and her father safely delivered a newborn wrapped in a kitchen towel to at a fire station.[32] The child was healthy and without signs of abuse.[33] He was later placed with an agency for the purpose of adoption.[34]

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[28] Telephone interview with Anna Aeschleman, Director of The Gloria M. Silverio Foundation, a/k/a A Safe Haven for Newborns (Dec. 31, 2004).

[29] Palataka Daily News, at www.safehavenfornewborns.com/palatka.html (last visited Jan. 27, 2005).

[30] *See* Section 383.50(5), Fla. Stat. (West 2000), which provides that when a woman utilizes the State's Safe Haven law "[e]xcept where there is actual or suspected child abuse or neglect, any parent who leaves a newborn infant with a firefighter or emergency medical technician at a fire station or brings a newborn infant to an emergency room of a hospital and expressed an intent to leave the newborn infant and not return has the absolute right to remain anonymous and to leave at any time and may not be pursued or followed unless the parent seeks to reclaim the newborn infant."

See also Section 383.50(10), Fla. Stat. (West 2000) providing that "[a] criminal investigation shall not be initiated solely because a newborn infant is left at a hospital under this section unless there is actual or suspected child abuse or neglect."

[31] Palataka, *supra*.

[32] Sarasota Herald Tribune, Nameless visitors drop off newborn, Section B, Page BMI, April 6, 2003, *available at* www.safehavenfornewborns.com/Sarasota%20Herald.html (last visited Dec. 22, 2005).

[33] *Id.*

[34] *Id.*

In Louisiana, the Crisis Pregnancy Health Center of Slidell, Inc. received a telephone call from Anne.[35] Anne had given birth and did not want to keep the baby.[36] She knew of the State's Safe Haven law and had intended on utilizing it rather than abortion.[37] The child was a healthy baby girl, just two hours old, who was later brought to a hospital and turned over to Louisiana social services.[38] Within 72 hours "Claudia" was placed with foster parents who later adopted her.[39]

IV.

SAFE HAVEN A/K/A BABY MOSES LEGISLATION CREATES A SIGNIFICANT CHANGE IN THE SOCIAL AND LEGAL ATMOSPHERE THROUGHOUT THE UNITED STATES.[40]

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[35] "Anne" was the name provided to the Center by the mother of the newborn. Her complete name remains unknown as Anne chose to anonymously and safely abandon her child in May, 2004.

[36] Interview with Cynthia Collins of the Crisis Pregnancy Health Center of Slidell, Inc., in Washington D.C. (Jan. 1, 2005).

[37] *Id.*

[38] *Id.*

[39] *Id.* The infant was named Claudia and is currently eight months old.

[40] *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), *cert. filed* Docket No. 04-967

When this Court was presented with, and later decided *Roe*, Safe Haven laws were not in existence.[41] Safe Haven laws were created post-*Roe* for the purpose of protecting newborns from harm. The purpose of this body of legislation does not lessen its application to the matter currently at issue, however. Rather, the laws are directly applicable as they create an option for a woman that was not available in 1973. Thus, the mere existence of these laws in nearly every state throughout our country creates a significant change in both the legal and social atmosphere from when the Court originally heard *Roe*. Therefore, it is time for this Court to reconsider the impact that the decision in *Roe* has across the Nation.

A. LEGAL CHANGE: ABORTION WAS LEGALIZED WHILE ABANDONMENT WAS CRIMINALIZED

In 1973, a woman was not provided with immunity from criminal prosecution for the act of anonymously abandoning her child. Rather, immunity to criminal charges began in 2000 with the enactment of Texas' Safe Haven law and subsequently followed in forty-five other states across the Nation.[42] Further, in 1973 abortion was legalized via this Court's ruling in *Roe*. Essentially, abortion was legalized while abandonment was criminalized. With this in mind, it was more favorable during the time period from 1973 through 2000 for a woman to abort an unwanted child rather than carry it to term, give birth, and safely abandon the child.

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[41] *Doe v. Bolton*, 410 U.S. 179 (1973).

[42] As discussed above, several states provide women with an affirmative defense to prosecution, while others provide complete immunity.

Since 2000, a shift occurred that transferred the "burden" of an unwanted child from the woman to the state. This shift has been taken on by the states voluntarily through the enactment of Safe Haven laws. [43] Presently, the woman simply needs to present her child to the proper authorities and the state will bear the costs of childcare and the burden of child rearing until the child is legally adopted.

Therefore, women can now anonymously abandon their young children without fear of prosecution as abandonment without abuse has essentially been legalized.[44] Accordingly, since abandonment without abuse is no longer criminalized as it was in 1973, the Court should reassess the assumptions in *Roe* regarding abortion being necessary to avoid the burden of "unwanted" children.

B. SOCIAL CHANGE: THE FEARS AND STIGMAS RELATED TO UNWANTED PREGNANCIES HAVE BEEN RELIEVED.

At the time *Roe* was decided, fears and stigmas related to women faced with an unwanted pregnancy were widespread within our society and were of concern to this Court. In *Doe*, as in *Roe*, we similarly found this Court concerned with the future of a woman who as allegedly faced with an unwanted pregnancy.[45]

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[43] Seventy-seven members of the U. S. House of Representatives presented a bill to the entire House that would have provided funding to state safe haven programs. In summary, the Act would have amended Temporary Assistance for Needy Families of Title IV of the Social Security Act to allow the states to apply for funding for their safe haven program. See H.R. 2018, 107th Congress, 1st Session, Safe Havens Support Act. This Bill was referred to the House subcommittee on Education Reform on July 25, 2001.

[44] An exception is found within many/the statutes for abuse. *See* ALA. CODE, et al., *supra*.

[45] *Doe v. Bolton*, 410 U.S. 179 (1973), It was alleged that *Doe* was abandoned by her husband, unable to care for other children of her own, impoverished and would have been "unable to care for or support the new child," *Id.* at 185.

As two Justices of this Court realized, "[a]t the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are, nevertheless, unwanted for any one or more of a variety of reasons – convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc."[46]

In analyzing the Georgia abortion statute, this Court reasoned that:

> Elaborate argument is hardly necessary to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future. For example, rejected applicants under the Georgia statute are required...to abandon educational plans; to sustain loss of income; to forgo the satisfaction of careers; to tax further mental and physical health in providing child care; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.[47]

These fears and stigmas have since been relieved through the combination of the enactment of Safe Haven laws across the Nation and a deeper awareness by our culture. The life and future of a woman no longer needs to be distressed by the burden of additional offspring. Now, educational plans may be pursued, income may be maintained, and careers can be sought by women who give birth and safely and anonymously abandon their babies. The taxing of a woman's mental and physical health due to child care is now irrelevant as she no longer needs to provide the care. Any distress associated with the unwanted child is calmed by

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"That opinion [*Doe v. Bolton*] and this one, are to be read together." *Roe, supra* at 165, citing *Doe*.

[46] *Doe, supra* at 222 (White, J., dissenting).

[47] *Id.* at 215-16.

the knowledge that the woman can choose to safely abandon the child without fear of prosecution. The problem of an unable family is resolved, as the states are able when the families are not. These significant changes in the social conditions surrounding pregnancy merit reassessment of *Roe*.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for a writ of certiorari should be granted.

January 2005

RESPECTFULLY SUBMITTED,

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APPENDIX

OR. REV. STAT. § 418.017 (2001):

(1) A parent may leave an infant at an authorized facility in the physical custody of an agent, employee, doctor or other medical professional working at the authorized facility if the infant:

(a) Is 30 days of age or younger as determined to a reasonable degree of medical certainty; and

(b) Has no evidence of abuse.

(2) A parent leaving an infant under this section is not required to provide any identifying information about the infant or the parent.

(3) An employee, agent, doctor or other medical professional working at an authorized facility shall receive an infant brought to the authorized facility under this section.

(4) If acting in good faith in receiving an infant, an authorized facility receiving an infant under this section and any agent, employee, doctor or other medical professional working at the authorized facility are immune from any criminal or civil liability that otherwise might result from their actions relating to receiving the infant. A city, county or other political subdivision of this state that operates a sheriff's office, police station or fire station that receives an infant under this section is immune from any criminal or civil liability that otherwise might result from the actions taken by its employees or agents in receiving the infant.

(5) When an infant has been left at an authorized facility as provided in this section:

(a) The authorized facility shall notify the Department of Human Services that an infant has been left at the facility as provided in subsection (1) of this section no later than 24 hours after receiving the infant.

(b) The infant is deemed abandoned for purposes of ORS 419B.100, and the department is

deemed to have protective custody of the infant under ORS 419B.150 from the moment the infant was left at the facility. The department shall comply with the applicable provisions of ORS chapter 419B with regard to the infant. (6) The authorized facility shall release the infant to the department when release is appropriate considering the infant's medical condition and shall provide the department with all information the facility has regarding the infant.

(7) As used in this section:

(a) "Abuse" has the meaning given that term in ORS 419B.005.

(b) "Authorized facility" means a hospital as described in ORS 442.015, freestanding birthing center as defined in ORS 442.015, physician's office, sheriff's office, police station or fire station.

(c) "Physician" means a person licensed by the Board of Medical Examiners for the State of Oregon to practice medicine and surgery.

(12)

No. 04-967

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In The

Supreme Court of the United States

NORMA MCCORVEY,
FORMERLY KNOWN AS JANE ROE,

Petitioner,

v.

WILLIAM "BILL" HILL, DALLAS COUNTY
DISTRICT ATTORNEY AS SUCCESSOR
IN OFFICE TO HENRY WADE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* OF THE NURTURING NETWORK, HEARTBEAT INTERNATIONAL, CARE NET, NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, AND ABORTION RECOVERY INTERNATIONAL NETWORK IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Should the original judgment in *Roe v. Wade* be vacated under FRCP 60(b) due to substantially changed factual and/or legal conditions that make *Roe* no longer just or equitable for prospective application?

2. Is Petitioner Norma McCorvey entitled under FRCP 60(b) to any relief, substantive or procedural?

3. Should the Court, at a minimum, require a hearing to afford fundamental due process which would lead to determining whether *Roe v. Wade* should be re-examined?

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"A List of Major Psychological Sequelae of Abortion," Fact Sheet Courtesy of the Elliot Institute, Springfield, Illinois, 1997 (from www.after abortion.org) 7

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STATEMENT OF INTEREST OF *AMICI*[1]

Amici curiae Heartbeat International, Inc, Care Net, The Nurturing Network (TNN), Abortion Recovery International Network (ARIN), and National Institute of Family and Life Advocates (NIFLA) are 501(c)(3) not for profit organizations involved in caring for women who encounter an unexpected pregnancy or its aftermath.

As national organizations whose affiliated members, professional staff and volunteers have collectively worked directly with the hundreds of thousands of women who encounter crisis pregnancies, many of whom have experienced or will soon face harmful post-abortion symptoms or conditions harmful to their physical and psychological health, each of the *amicus* parties has a direct and vital interest in protecting women from the various harms abortion yields that were not known or considered by the Court when it rendered its opinion in *Roe v. Wade*, 410 U.S. 113 (1973).

Because *amici* have witnessed and now care for the thousands of women who are now reporting how abortion has harmed them and because *amici* have every reason to believe that many more women will be coming forward to report the harm abortion has done and is doing to them, all *amici* urge this Court to grant *certiorari* so that Petitioner Norma McCorvey can demonstrate to this Court pursuant to FRCP 60(b) that the factual and legal assumptions upon which the Court rested its *Roe* decision have so materially changed as to make further prospective application of that decision neither just nor equitable to the interests of all parties involved.

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[1] Counsel for *amici* state that they authorized this brief in whole and that in addition to the *amici*, the only entity to make a monetary contribution to the preparation of this brief is the Alliance Defense Fund.

SUMMARY OF ARGUMENT

Amici join petitioner, Norma McCorvey (Petitioner) in urging this Court to grant *certiorari* to review the issue of whether petitioner has satisfied this Court's standards under FRCP 60(b) announced in *Agostini v. Felton*, 521 U.S. 203 (1997) for relieving her from the prospective application of this Court's judgment in *Roe v. Wade*, 410 U.S. 113 (1973).

In *Agostini*, the Court held under FRCP 60(b) that the threshold issue is "whether the factual or legal landscape has changed since . . . [the prior ruling of the Court]." 521 U.S. at 216. *Amici* submit this brief with regard to two substantial "factual" presumptions made by the Court that have changed since the decision in *Roe v. Wade*, 410 U.S. 113 (1973). First, contrary to the expressed presumption in *Roe* that abortion helps women, the *amici* have first hand experience that abortion poses significant and grave risks to the health of women far exceeding the health risks and other concerns posed by carrying their children to term. Secondly, in the 31 years since *Roe* was decided, an infrastructure of care has developed offering a variety of practical and compassionate alternatives to abortion for women that simply did not exist in 1973. These alternatives mean that an unwanted pregnancy no longer has to mean an unwanted and burdensome child, a dashed career or an unsafe abortion because an extensive infrastructure of care has developed to assist women in crisis pregnancies throughout the United States.

Granting *certiorari* will allow this Court the opportunity that *Agostini* holds only this Court can grant to closely scrutinize and evaluate the evidence of these substantial changes which, *amici* respectfully submit, render the prospective enforcement and application of *Roe* no longer just or equitable in light of the very real harms attendant with abortion for so many women, particularly in light of the superior alternatives now available as a matter of fact and law.

ARGUMENT

I. AS CONSTRUED BY THE COURT IN *AGOSTINI V. FELTON*, 521 U.S. 203 (1997), THE APPLICATION OF FRCP 60(b), COMPELS THIS COURT'S CONSIDERATION OF MATERIALLY CHANGED FACTUAL CIRCUMSTANCES REGARDING THE HARM ABORTION CAUSES WOMEN AND THE BETTER ALTERNATIVES TO ABORTION THAT WERE NOT KNOWN AT THE TIME OF THIS COURT'S *ROE V. WADE* DECISION, 410 U.S. 113 (1973).

A. Pursuant to the Court's Construction of FRCP 60(b) in *Agostini* and *Stare Decisis* in *Casey*, This Court Has the Legal Authority to Grant Petitioner's Motion.

This Court held in *Agostini v. Felton*, 521 U.S. 203 (1997) that a change in legal circumstances warranted reversal of its previous decision issued twelve years earlier in *Aguilar v. Felton*, 473 U.S. 402 (1985). Specifically, the Court found that several of its decisions issued in the intervening years undermined the holding in *Aguilar* so that continued adherence to *Aguilar* would cause manifest injustice:

> In *Rufo v. Inmates of Suffolk County Jail*, *supra*, at 384, we held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show "a significant change either in factual conditions or in law." A court may recognize subsequent changes in either statutory or decisional law . . . "The court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong" (citations omitted). *Agostini v. Felton*, 521 U.S. 203, 215 (1997).

Moreover, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) a plurality of this Court declined to overrule *Roe's* "central rule" based upon principles of "institutional

integrity and "the rule of *stare decisis*." However, even in that case where the Court was presented with none of the changed factual and legal circumstances that Petitioner is seeking to present in this case, the Court recognized that "[i]n constitutional adjudication as well as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty." 505 U.S. at 864. However, the Court stated it would only overrule a prior decision in a context where the Court's overruling action was "comprehensible as the Court's response to facts that the country could understand" (*Id.* at 863) based upon "applications of constitutional principle to facts as they had not been seen by the Court before" (*Id.* at 864) and was not an "unjustified repudiation of the principle on which the Court staked its authority in the first instance." *Id.* at 867.

Unlike *Casey* where the Court was not asked to consider the changed factual and legal circumstances presented by this case, granting *certiorari* will yield this Court a greater, more thorough opportunity to closely scrutinize and evaluate the substantial and significant factual changes surrounding the practice of abortion, which render continued prospective enforcement and application of *Roe* no longer just or reasonable. Such action would be comprehensible by the country because the Court would be responding to the harm abortion is doing to women that this Court has not previously adjudicated and would be consistent with the Court's concern expressed in *Roe* that women's interests be fully protected by the Constitution.

B. The Undersigned *Amici* Can Provide Ample Evidence of Changed Factual and Legal Circumstances to Grant Petitioner's FRCP 60(b) Motion.

The first factual change relates to the issue of the health of the mother. Originally the assumption was that

the termination of an unwanted pregnancy through an abortion provided a safe end to a short-term crisis that would allow women to return to a normal and a productive life. However, the years that have passed since *Roe* have made clear that the crisis does not end for a substantial number of women after their abortions. These women cannot just "get over" the experience of their abortions. Instead, a great many of these women are psychologically devastated as the realization sinks in that they have destroyed their own children. For these women, abortion is not a relatively safe and easy solution to a crisis pregnancy, but the beginning of a much greater crisis.

A second factor that has changed also relates to the health of the mother. There are now a myriad of practical and compassionate alternatives to abortion that simply did not exist in 1973. An extensive infrastructure of care is now available to women in crisis pregnancies throughout the United States. This care network allows women to avoid the grave emotional and financial hardships that some women once faced in giving birth, while at the same time allowing them to avoid the emotional harms of an abortion.

II. JUSTICE AND EQUITY NOW REQUIRE THIS COURT TO CONSIDER UNDER FRCP 60(b) THE SERIOUS, PERVASIVE LONG-TERM PSYCHOLOGICAL CONSEQUENCES THAT *AMICI* HAVE WITNESSED AND CURRENTLY CARE FOR IN THE LIVES OF HUNDREDS OF THOUSANDS OF POST-ABORTIVE WOMEN AS A CHANGED FACTUAL CIRCUMSTANCE, NOT CONSIDERED BY THIS COURT IN ITS PRIOR *ROE* OPINION.

Roe was founded largely upon the assumption that an unwanted pregnancy presents a short-term crisis and that an abortion would provide a "health" benefit to the woman facing such a crisis by allowing her to return to a normal

and productive life. In focusing on the *health* of women, it was assumed that abortion was a relatively rare and safe procedure without lasting harmful effects on the woman.[2] With the dramatic increase of abortions since the *Roe* decision, the unexpected and tragic consequences of abortion are emerging and establish the need to reexamine *Roe's* assumption with regard to abortion and the health of the mother.[3]

In 1973, neither this Court nor the women who have undergone abortions since then, could have known of the

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[2] The *Roe* Court further assumed that a woman's decision to obtain an abortion would be a *medical* decision that would be made by or in conjunction with the woman's physician, and such relationship of professional medical care would *presumably* alleviate any health or safety issues. 410 U.S. at 149-150. As the evidence offered by Petitioner below and lodged with this Court comprehensively shows, nothing could be further from the truth today. To the contrary, as the tens of thousands of women served by *amici* have told *amici*, most women don't even meet a doctor until their abortion is underway and most report their decision to abort was coerced and characterized by either an inadequate or total lack of the informed medical consent required in every state in other forms of professional medical care but more often than not are actually absent in the case of abortion, contrary to the Court's presumptions in *Roe*.

[3] According to the abortion industry's research agency, the Alan Guttmacher Institute (for the years 1973-2000) and the National Right to Life Committee's estimates for the years 2001 through 2004), 46,023,191 abortions have been reported in the United States since *Roe* was decided in 1973. See NRLC Web site at http://www.nrlc.org/abortion/facts/abortionstats.html. Based upon their collective experience caring for post-abortive women, *amici* estimate at least 75% of those women have suffered from or are currently suffering psychological or physical harm from their abortion. The magnitude of this harm to women's health, as well as the "downsizing" of America's population by abortion [ranging from a population loss by age group of between 10.2% and 27.4%, excepting only the age group 45 years or older in 2000], now presents implications for women's health, social security and immigration policy that cannot be adequately addressed or corrected by our democratic institutions so long as this Court refuses to consider the material factual and legal circumstances that were not known or not considered when *Roe* was decided.

psychological and physiological harm legalized abortion would cause them to suffer.[4] The presumption communicated by *Roe* and its progeny is that "abortion is legal, and therefore it must be safe as well." However, the experience of the *amici*, in working with thousands of women yearly since the *Roe* decision, parallel the findings presented in the affidavits of David C. Reardon, Ph.D. and Theresa Burke, Ph.D. (summarized in the Appendix to Petitioner's *certiorari* petition and otherwise lodged with the Clerk of the Court) regarding the complications and ill-effects of abortion. The harmful psychological effects include post-abortion traumatic stress disorder; suicide, suicidal attempts, and suicidal ideation requiring psychiatric care and/or the use of psychotropic drugs; sleep disturbance (including recurring nightmares); sexual dysfunction; increased smoking, alcohol and drug abuse; eating disorders; abuse and/or neglect of their living children; chronic relationship problems (including divorce); and repeat abortions.[5] Surely, these changed factual circumstances, further documented below by *amici*, warrant this Court's immediate attention under FRCP 60(b), particularly since this Court has established itself as the only public institution with the constitutional authority to do so.[6]

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[4] This brief addresses only the psychological effects of abortion as experienced by the women counseled by the *amici* and their affiliates.

[5] "A List of Major Psychological Sequelae of Abortion," Fact Sheet Courtesy of the Elliot Institute, Springfield, Illinois, 1997 (from www.afterabortion.org), at App. 3-14.

[6] As Justice Jones succinctly pointed out in her concurring opinion below: "[T]he problem inherent in the Court's decision to constitutionalize abortion policy is that unless the Court creates another exception to the mootness doctrine, the Court will never be able to examine its factual assumptions on a record made in court . . . Hard and social science will of course progress even though the Supreme Court averts its eyes . . . One may fervently hope that the Court will someday acknowledge such developments and re-evaluate *Roe* and *Casey* accordingly." See Petitioner's *Petition for Certiorari*, App. 11-12.

A. "If Only I had Known": The Nurturing Network's 20-Year Experience Counseling and Caring for Thousands of Post-Abortive Women.

The Nurturing Network (TNN) is extensively involved working with clients suffering from post-abortion trauma. Approximately 50% of all TNN clients have already experienced at least one abortion at the time they contact TNN for help.[7]

Many TNN clients express fear in having to go through another abortion. They also relate great remorse and conviction not to add to the emotional anguish they have already endured. They also often share a sense of having been betrayed and then abandoned by those who convinced or coerced them into having an abortion.

TNN has found that the forces and influences that tend to drive women to abortion are an immediate attempt to escape from shame, hope for greater economic security, and the hope of saving a fragile relationship. However, the actual testimonies of the betrayed and abandoned women in Nurturing Network's client files expose the miscalculations and illuminate the disillusionment that follows their abortions.

Most women readily identify four primary sources of pressure or coercion that lead them to abortion: the father of the baby, forcing a choice between the relationship with him or the baby; parents, forcing a choice between continued support and the baby; employers, forcing a choice between continued employment and the baby; and peers, forcing a choice between continued social standing or the baby. Each ultimatum threatens to impose an emotional

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[7] See "The Nurturing Network: Serving the Urgent and Practical Needs of Mothers in Crisis: Personal Reflections of the Founder Based Upon Twenty Years of Compassion in Action" written by TNN President and Founder Mary Cunningham Agee, posted on TNN's website at www.nurturingnetwork.org, at App. 15-29.

toll calculated to force the pregnant woman to make a desperate choice.[8]

And yet, as the testimonies in the Appendix[9] indicate, it is primarily the woman alone who suffers the agonizing remorse, the hidden grief, and the debilitating guilt from undergoing the abortion. Thus, most women who have chosen abortion do so not out of "freedom of choice" but out of a desperate sense that they have no choice at all. Under these circumstances, most post-abortive women come to believe that the only "freedom" an abortion affords is experienced by those "significant others" who have much to lose if the pregnancy continues.

Another tragic, but all too often occurrence among post-abortive women, is that after expressing regret in having made the "choice" to abort, many of these women become pregnant again in an effort to remedy their error and "recreate" their deceased child, only to then experience yet another abortion, because they are convinced once again it is the only "practical" thing to do.[10]

The President and Founder of TNN, Mary Cunningham Agee, relates the following regarding her extensive experience during the past twenty years addressing post-abortion trauma in women:[11]

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[8] *Ibid.*

[9] *Ibid.*

[10] The existence of this harmful post-abortive behavior is further documented by the fact, reported by the National Right to Life Committee, that nearly half of all abortions are obtained by women who have already had at least one abortion. For example, in 1994 and 1995, women who had already had three or more abortions obtained 7%, or nearly 100,000, abortions each year. See NRLC Web Site at http://www.nrlc.org/abortion/facts/abortionstats2.html.

[11] *Amici* submit that Ms. Cunningham Agee's observations, more fully set forth in the Appendix (App. 15-37) are entitled to considerable weight and respect by virtue of her educational background (Harvard MBA), vocational achievement as a well-respected Fortune 100 corporate executive and best-selling author and, most importantly, her twenty

(Continued on following page)

"If only I had known." This is the haunting lament that I hear almost daily on the toll free crisis hotline of the Nurturing Network. Since founding this charitable organization almost twenty years ago, I have been invited by literally thousands of frightened, wounded women to understand the painful circumstances of their troubled lives. Let me assure you that they do not call to express satisfaction in their "reproductive freedom" to terminate the life of their unborn child. They call desperately seeking immediate, practical assistance in order to avoid an abortion procedure which almost half of our clients have already experienced in a prior pregnancy . . . .

I have come to know this topic up close and in living color through the tragic life stories of women who believed the marketing rhetoric about this allegedly safe and easy procedure. And yet, almost all of them would tell you that if they could erase just one decision in their lives, it would be the irreversible one that ended the life of their unborn child. Their grief is difficult to capture here in a few words because it is always tinged with a sense of having been betrayed. These women consistently describe the panic and loneliness that sets in when those whom she has trusted create fatal trade-offs between their role in her life and her child. How can she help but feel tricked and manipulated by boyfriends, parents, friends and employers who conveniently wash their hands of her maternal needs and choose to describe her unborn child as an inconvenience and even a threat. None of these accomplices, of course, will ever live out the permanent consequences of an

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years of philanthropy and volunteer service dedicated to setting up TNN and then serving voluntarily counseling post-abortive women and supervising the work of thousands on TNN volunteers who assist these women suffering such harm.

abortion decision the way she will and so her sense of abandonment and isolation is profound.[12]

Ms. Cunningham Agee, spoke for all *amici* and their clients when she recently summarized the changed factual circumstances in a recent address published on the TNN web site:[13]

> *There have been other times in history when a solution initially considered to be helpful or at least useful was eventually exposed as being dangerous and even harmful. It requires a certain humility, honesty and open mindedness to admit when a judgment must change in light of new and more compelling facts. This is what the women whose painful experiences are captured in the attached testimonies are calling for today.*
>
> *The simple but profound truth is that abortion has not turned out to be the private, painless, safe solution that many had hoped it would be. Yes, it is quicker and seemingly less complex than alternative solutions. It surely is final. But the living testimonies of TNN clients reveals that this procedure, often sought in haste and without a full understanding of the emotional risks, has inflicted profound and lasting harm on a generation of women. Their voices say better than anyone else ever could: Women deserve better than abortion. It is time for this tragedy to end.*
>
> *I need only to reflect upon the thousands of women whom I have had the privilege of serving since founding the Nurturing Network to say with conviction that the binding of deep wounds and*

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[12] See "The Health Risks of Abortion," A panel presentation for The Family Research Council offered by Mary Cunningham Agee, President & Founder of The Nurturing Network, in April 2002, at App. 30-37.

[13] See Nurturing Network: Serving the Urgent and Practical Needs of Mothers in Crisis, App. 15-29.

the healing of broken hearts is an intensely intimate and time-consuming process. In a society that prides itself on finding quick fixes and expedient solutions to any inconvenience or problem, it is understandable that we would seek a short cut to solve the crisis of an unplanned pregnancy. But time and experience reveal that no fast solution exists without causing profound and lasting harm to both the mother and the child.[14]

B. The Consistent Experience of Heartbeat International's Affiliates Is that Abortion Harms Women So Deeply and So Often that Most Affiliates Now Offer Post-Abortion Counseling Programs to Address the Depression, Anger and Regret Post-Abortive Women Suffer.

Since its beginning in the early 1970s, affiliates of Heartbeat International have also worked with many thousands of clients who suffer emotionally from having undergone abortions. Although the term "post abortion syndrome" had not yet been coined in the early 1970's, the Heartbeat International affiliate pregnancy centers quickly began to see suffering clients who had one or more abortions. In consulting with professionals to develop programs to help these women, the centers were advised on the one hand, that abortion did not have any damaging effects on women. Yet, on the other hand, the centers were cautioned that volunteers ("nonprofessionals") should not get involved for fear that post-abortive women might become suicidal. This advice only confirmed what the centers were experiencing, that for a significant number of

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[14] For the testimonies referred to in Ms. Cunningham Agee's address, quoted above, see App. 23-29.

women, the choice to abort their children left them deeply psychologically harmed.[15]

Like TNN's Founder Mary Cunningham Agee, the President of Heartbeat International, Dr. Peggy Hartshorn, has personally received hundreds of calls and letters and personal contacts from women looking for post-abortion help who expressed depression, anger and regret as a result of a past abortion. Heartbeat International's experience in working with such women over the years further substantiates the research findings of Dr. Reardon and Dr. Burke (summarized in the Appendix to Petitioner's *certioriari* petition and set forth in the record below lodged of this Court) with regard to the psychological harm their clientele are experiencing.

Because of the great number of post-abortive women seeking help over the years, Heartbeat International advises affiliates to have professional counselors available as resources and referrals. 69% of the pregnancy resource centers affiliated with Heartbeat International now offer post-abortion programs. For example, one Columbus, Ohio Heartbeat International affiliate, Pregnancy Decisions Health Centers (PDHC), reports that in 2002, 57% of its post-abortive clients reported "unresolved feelings" and "regret" with regard to past abortions; in 2003 55% of the post-abortion clients reported unresolved feelings and regret. That number climbed to 68% in the first three quarters of 2004.[16]

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[15] Peggy Hartshorn, Ph.D: "Pregnancy Help Centers: Prevention, Crisis Intervention, Healing: Putting It All Together," published in *Back to the Drawing Board: The Future of the Pro-Life Movement*, Teresa R. Wagner, ed. (South Bend, Ind.: St. Augustine's press, 2003), as excerpted for the Court's reference at App. 38-48.

[16] See "Pregnancy Decision Health Centers (PDHC) Annual Report, 2003," and "Board Report: 3rd Quarter 2004" (published in the PDHC Annual Report, 2004 to be released in February 2005), at App. 49-62.

Heartbeat International is not alone in these findings. Of the 2,026 pregnancy resource centers in the United States (according to Heartbeat International's count); a conservative figure is that at least 785 of all pregnancy resource centers now offer post-abortion programs to help women who are suffering from symptoms of post-abortion trauma in addition to other services.[17]

C. Care Net's Affiliated Pregnancy Resource Centers Annually Serve More than 100,000 Women Suffering from the Adverse Impacts of Abortion Upon their Health.

Care Net is a large network of over 800 pregnancy resource centers, which provide support, care and resources to pregnant women.

In 2004, 101,000 women and 2,710 men participated in Care Net pregnancy center post-abortion counseling and education support groups in this nation. One of Care Net's affiliates reports that 75% of its clients have experienced past abortions, and struggle with the grief from the experience. In response, 454 Care Net pregnancy centers now offer recovery support groups to women and men who have experienced the trauma of a past abortion, that they may restore the value of their children whom they have lost to abortion through the experience of receiving and acknowledging forgiveness, and the provision of a safe environment in which they can express their grief.[18]

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[17] *Ibid.* See also the Heartbeat International "Worldwide Directory of Life Affirming Pregnancy Services," available at www.heartbeatinternational.org.

[18] "The Ministry of Care Net" (2004 Information Brochure). App. 63-68.

III. OPERATING NETWORKS OF AGENCIES GENERALLY AVAILABLE WITHOUT CHARGE THROUGHOUT AMERICA OFFERING BETTER ALTERNATIVES TO ABORTION – MORE PROTECTIVE OF THE PHYSICAL, PSYCHOLOGICAL, SOCIAL, SPIRITUAL AND LEGAL INTERESTS OF WOMEN AND THEIR CHILDREN – IS A SUBSTANTIAL CHANGED FACTUAL CIRCUMSTANCE THAT JUSTICE AND EQUITY NOW REQUIRE THIS COURT TO CONSIDER UNDER FRCP 60(b).

A further concern of this Court in *Roe* was the distress and difficulties that the Court presumed bringing an unwanted child into the world would have upon the mother psychologically and financially. *Roe*, 410 U.S. at 153. The Court was concerned that women often had only a few options: single parenthood with the prospect of poverty; a dashed career, adoption with the attendant stigma, or a costly and, in most states, illegal "back alley" abortion. Moreover, there were few material and social resources available to pregnant women to help them through the pregnancy and afterward.

However, over the last 31 years since *Roe* was decided, an infrastructure of care offering practical support to pregnant women facing crisis pregnancies has developed. In the public realm, this includes the recent "Safe Haven" or "Baby Moses" laws, now adopted in 46 states. These laws allow mothers who are unable to keep their babies for any reason, to drop them off at fire stations or hospitals without question, financial obligation, risk of criminal liability, or the need to go through the stigma or burden of adoption proceedings.[19]

In the private realm, over the last 31 years since *Roe*, a network of nearly 3,500 organizations has arisen

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[19] See Petitioner's *Certiorari* Petition at 16-18.

throughout the United States to form an infrastructure of care, offering practical support to women facing crisis pregnancies.[20] The development of the infrastructure is exemplified by the Heartbeat International Worldwide Directory of Life Affirming Pregnancy Services. While the initial Directory only listed about 75 entries for organizations providing alternatives to abortion, the 2004 Directory lists 5,162 organizations. Of those organizations, 3,471 are in the United States.[21] These include approximately 2,026 pregnancy resource centers offering medical services, support services to pregnant women including hotline counseling services, and/or clothing and housing; nonprofit adoption agencies; social service agencies; and groups that offer post-abortion support. In addition, to the pregnancy resource centers and other services, the Directory lists 507 professional social service agencies, such as Catholic Charities, also known for providing alternatives to abortion; 319 maternity homes; 166 non-profit, adoption agencies; 27 hotlines; and 54 independent post-abortion programs, the vast majority of these are housed within pregnancy resource centers.

A. Heartbeat International Affiliates Now Offer A Wide Range of Free Women's Health Services not Available in 1973 When *Roe* was Decided.

As stated above, *amici* Heartbeat International is an association of pregnancy resource centers, medical clinics,

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[20] Currently, pregnancy resource centers outnumber the abortion clinics by 1,283 in the United States. This figure is based on the report from Life Dynamics (at www.ldi.org) that there are currently 743 abortion clinics in the United States, as compared with the 2,026 pregnancy resource centers in the United States listed in the Heartbeat International Worldwide Directory of Life Affirming Pregnancy Services (at www.heartbeatinternational.org).

[21] See Heartbeat International's website, at www.heartbeatinternational.org.

maternity homes and nonprofit adoption agencies serving over 850 affiliates in the United States and in 33 countries. Heartbeat International was formed in 1971 as a loose federation of independent organizations that sought to network with each other primarily in the "crisis intervention" arena, offering pregnant women support and referrals to a variety of services in the community such as medical care, housing, material aid, and social services. [22]

Today, most pregnancy resource centers, including those affiliated with Heartbeat International offer a wide range of services completely free of charge. For instance, 479 of the Heartbeat affiliates have added medical services, including ultrasound technology. Typical services include pregnancy tests, crisis intervention for those deciding among alternatives, peer or professional counseling, support groups, adoption support, parenting classes, shelter, material aid (clothing, baby items, etc.), community referrals, and community education programs. They are staffed by a combination of professionals in various fields and lay volunteers. Many also offer professional services needed for adoption, medical care, childbirth classes, legal assistance, financial assistance, housing, and many other services that women facing an unexpected pregnancy need, again, without charge. In the last several years, Heartbeat International affiliated centers have begun to offer a wide range of medical and health services including STD testing, pap smears, prenatal care, abuse recovery, and post-abortion programs. Such centers are also adding, natural family planning counseling, birthing centers, and even well baby care.[23]

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[22] Hartshorn, *ibid.*

[23] Hartshorn, *ibid.*

B. Care Net Mobilizes an Affiliated Network of About 2400 Paid Staff and 30,000 Volunteers to Help Woman Find Good Alternatives to Abortion or to Recover from the Harm Abortion Has Caused Them To Suffer.

Similarly, *amici* Care Net, is one of the largest pro-life organizations in the network of pregnancy resources centers. Care Net represents a network of over 800 pregnancy resource centers, which include about 2,400 paid staff, and approximately 30,000 volunteers. Care Net affiliates services are similar to those of Heartbeat International and serve over 250,000 young women who come to the centers each year struggling with the fear of being pregnant and alone. During the year, they provide alternatives to abortion for over 100,000 women. Care Net's affiliates serve women in crisis pregnancy situations in three primary ways: namely intervention, prevention and reconciliation.[24]

Four hundred and fifty four of Care Net's affiliated centers offer recovery support groups to women and men who have experienced the trauma of a past abortion as part of the process of healing and reconciliation. Also, Care Net, like the other *amici*, is dedicated to prevention. To that end, individual clients received lifestyle counseling, emphasizing the importance of sexual abstinence until marriage. Care Net also presents the message of sexual abstinence to the public. Care Net pregnancy center staff and volunteers gave presentations to over 800,000 students in classrooms and in civic organizations across North America in 2003.[25]

As a further service, the Option Line call center, operated and managed by Care Net and Heartbeat International jointly, now provides women in crisis with real

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[24] "The Ministry of Care Net" (2004 Information Brochure). App. 63-68.

[25] *Ibid.*

help 24 hours a day, seven days a week. The Option Line currently handles calls and emails from about 5000 women every month.[26]

C. The Nurturing Network Focuses Heavily on the Post-birth Care of Mothers and their Babies.

This infrastructure of care developed to provide women with alternatives to abortion does not end after the children are born. The Nurturing Network (TNN) maintains over 42,000 volunteer resource members who provide for all of the urgent and practical needs of women with unplanned pregnancies focusing heavily on this post-birth aspect of care for mothers. TNN has found that the woman most likely to have an abortion has earned at least a high school diploma, is from a middle-class background, and is between the ages of 20 and 26. Such women often feel that they have "too much to lose" by continuing an unwanted pregnancy, interrupting their future plans, and with no support.[27]

Like Heartbeat International and Care Net, TNN seeks to provide for every aspect of a pregnant woman's needs, from initial pregnancy testing to delivery of her baby and provision of information on parenting and adoption. Its volunteers include licensed counselors, nurses, social workers, and others, who seek to provide information to the clients on available resources. They also conduct detailed evaluations of clients' needs, and provide comprehensive plans of assistance, incorporating the appropriate services of TNN and other organizations.[28]

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[26] *Ibid.*

[27] *Ibid.* See also the TNN website, at www.nurturingnetwork.org.

[28] *Ibid.*

CONCLUSION

For all the foregoing reasons, *amici* urge this Court to grant the petition for writ of *certiorari*.

Respectfully submitted,

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February 7, 2005

STATEMENT OF INTEREST OF AMICI CURIAE

Heartbeat International, Inc. is a national association of life-affirming pregnancy resource centers, medical clinics, maternity homes and nonprofit adoption agencies. Heartbeat International currently serves over 850 affiliates in the United States and in 33 countries, providing them with the education, training and support they need to serve women who are facing unexpected pregnancies. Heartbeat International also provides a Worldwide Directory of Life Affirming Pregnancy Services, a comprehensive source which includes organizations providing alternatives to abortion. Heartbeat International is committed to the principle that it is tragic to tell a woman that her only option is to take the life of her child.

CareNet is a large network of over 800 pregnancy resource centers, all of which provide support, care and resources to pregnant women. 454 CareNet affiliate pregnancy centers offer recovery support groups to women and men who have experienced trauma with regard to past abortions.

The Nurturing Network (TNN) is an international charitable organization that works with over 42,000 volunteer resource members who provide for all of the urgent and practical needs of women with unplanned pregnancies. During the past twenty years TNN has served over 17,000 pregnant women and unborn children with its practical compassion.

The Abortion Recovery International Network (ARIN) is an affiliate organization dedicated to connecting like-minded abortion recovery programs with over 250 affiliates ("partners"), which provide post-abortion counseling, care, and assistance in various locations around the

world. It has developed the first online directory solely committed to listing abortion recovery programs within the United States and abroad. ARIN also assists in the design and development of new post-abortion programs for stand-alone recovery agencies, as well as the programs already existing in pregnancy resource centers.

The National Institute of Family and Life Advocates (NIFLA) supplies legal services and consultation to pregnancy help centers nationwide. Founded in 1993, NIFLA now serves a membership of 850 pregnancy resource centers in 48 states. Nearly 400 of these centers are either operating as medical clinics, or are preparing to do so in the near future. The services NIFLA provides to its members include: legal review and audit of pregnancy resource center documents, legal consultation and education of centers, board training for boards of directors of centers, publication of educational materials and training manuals, training in the development of medical clinic status, training of nurses and doctors in the provision of ultrasound services, and the publication of bulletins that highlight legal and medical concerns of which pregnancy resource centers need to be aware. NIFLA places an emphasis on the conversion of pregnancy resource centers into licensed medical clinics, to enable them to provide a variety of medical services to the women they serve such as: pregnancy diagnosis, pregnancy confirmation via an ultrasound examination, and testing and treatment for sexually transmitted diseases.

Fact Sheet Courtesy of the Elliot Institute,
PO Box 73478 Springfield, IL 62791-7348

A List of Major Psychological Sequelae of Abortion

REQUIREMENT OF PSYCHOLOGICAL TREATMENT:

In a study of post-abortion patients only 8 weeks after their abortion, researchers found that 44% complained of nervous disorders, 36% had experienced sleep disturbances, 31% had regrets about their decision, and 11% had been prescribed psychotropic medicine by their family doctor. (2) A 5 year retrospective study in two Canadian provinces found significantly greater use of medical and psychiatric services among aborted women. Most significant was the finding that 25% of aborted women made visits to psychiatrists as compared to 3% of the control group. (3) Women who have had abortions are significantly more likely than others to subsequently require admission to a psychiatric hospital. At especially high risk are teenagers, separated or divorced women, and women with a history of more than one abortion. (4)

Since many post-aborted women use repression as a coping mechanism, there may be a long period of denial before a woman seeks psychiatric care. These repressed feelings may cause psychosomatic illnesses and psychiatric or behavioral in other areas of her life. As a result, some counselors report that unacknowledged post-abortion distress is the causative factor in many of their female patients, even though their patients have come to them seeking therapy for seemingly unrelated problems. (5)

POST-TRAUMATIC STRESS DISORDER (PTSD or PAS): A major random study found that a minimum of

19% of post-abortion women suffer from diagnosable post-traumatic stress disorder (PTSD). Approximately half had many, but not all, symptoms of PTSD, and 20 to 40 percent showed moderate to high levels of stress and avoidance behavior relative to their abortion experiences. (6) Because this is a major disorder which may be present in many plaintiffs, and is not readily understood outside the counseling profession, the following summary is more complete than other entries in this section. PTSD is a psychological dysfunction which results from a traumatic experience which overwhelms a person's normal defense mechanisms resulting in intense fear, feelings of helplessness or being trapped, or loss of control. The risk that an experience will be traumatic is increased when the traumatizing event is perceived as including threats of physical injury, sexual violation, or the witnessing of or participation in a violent death. PTSD results when the traumatic event causes the hyperarousal of "flight or fight" defense mechanisms. This hyperarousal causes these defense mechanisms to become disorganized, disconnected from present circumstances, and take on a life of their own resulting in abnormal behavior and major personality disorders. As an example of this disconnection of mental functions, some PTSD victim may experience intense emotion but without clear memory of the event; others may remember every detail but without emotion; still others may reexperience both the event and the emotions in intrusive and overwhelming flashback experiences. (7)

Women may experience abortion as a traumatic event for several reasons. Many are forced into an unwanted abortions by husbands, boyfriends, parents, or others. If the woman has repeatedly been a victim of domineering abuse, such an unwanted abortion may be perceived as the

ultimate violation in a life characterized by abuse. Other women, no matter how compelling the reasons they have for seeking an abortion, may still perceive the termination of their pregnancy as the violent killing of their own child. The fear, anxiety, pain, and guilt associated with the procedure are mixed into this perception of grotesque and violent death. Still other women, report that the pain of abortion, inflicted upon them by a masked stranger invading their body, feels identical to rape. (8) Indeed, researchers have found that women with a history of sexual assault may experience greater distress during and after an abortion exactly because of these associations between the two experiences. (9) When the stressor leading to PTSD is abortion, some clinicians refer to this as Post-Abortion Syndrome (PAS).

The major symptoms of PTSD are generally classified under three categories: hyperarousal, intrusion, and constriction.

Hyperarousal is a characteristic of inappropriately and chronically aroused "fight or flight" defense mechanisms. The person is seemingly on permanent alert for threats of danger. Symptoms of hyperarousal include: exaggerated startle responses, anxiety attacks, irritability, outbursts of anger or rage, aggressive behavior, difficulty concentrating, hypervigilence, difficulty falling asleep or staying asleep, or physiological reactions upon exposure to situations that symbolize or resemble an aspect of the traumatic experience (eg. elevated pulse or sweat during a pelvic exam, or upon hearing a vacuum pump sound.)

Intrusion is the reexperience of the traumatic event at unwanted and unexpected times. Symptoms of intrusion in PAS cases include: recurrent and intrusive thoughts

about the abortion or aborted child, flashbacks in which the woman momentarily reexperiences an aspect of the abortion experience, nightmares about the abortion or child, or anniversary reactions of intense grief or depression on the due date of the aborted pregnancy or the anniversary date of the abortion.

Constriction is the numbing of emotional resources, or the development of behavioral patterns, so as to avoid stimuli associated with the trauma. It is avoidance behavior; an attempt to deny and avoid negative feelings or people, places, or things which aggravate the negative feelings associated with the trauma. In post-abortion trauma cases, constriction may include: an inability to recall the abortion experience or important parts of it; efforts to avoid activities or situations which may arouse recollections of the abortion; withdrawal from relationships, especially estrangement from those involved in the abortion decision; avoidance of children; efforts to avoid or deny thoughts or feelings about the abortion; restricted range of loving or tender feelings; a sense of a foreshortened future (e.g., does not expect a career, marriage, or children, or a long life.); diminished interest in previously enjoyed activities; drug or alcohol abuse; suicidal thoughts or acts; and other self-destructive tendencies.

As previously mentioned, Barnard's study identified a 19% rate of PTSD among women who had abortions three to five years previously. But in reality the actual rate is probably higher. Like most post-abortion studies, Barnard's study was handicapped by a fifty percent drop out rate. Clinical experience has demonstrated that the women least likely to cooperate in post-abortion research are those for whom the abortion caused the most psychological distress. Research has confirmed this insight,

demonstrating that the women who refuse followup evaluation most closely match the demographic characteristics of the women who suffer the most post-abortion distress. (10) The extraordinary high rate of refusal to participate in post-abortion studies may interpreted as evidence of constriction or avoidance behavior (not wanting to think about the abortion) which is a major symptom of PTSD.

For many women, the onset or accurate identification of PTSD symptoms may be delayed for several years. (11) Until a PTSD sufferer has received counseling and achieved adequate recovery, PTSD may result in a psychological disability which would prevent an injured abortion patient from bringing action within the normal statutory period. This disability may, therefore, provide grounds for an extended statutory period.

SEXUAL DYSFUNCTION: Thirty to fifty percent of aborted women report experiencing sexual dysfunctions, of both short and long duration, beginning immediately after their abortions. These problems may include one or more of the following: loss of pleasure from intercourse, increased pain, an aversion to sex and/or males in general, or the development of a promiscuous life-style. (12)

SUICIDAL IDEATION AND SUICIDE ATTEMPTS: Approximately 60 percent of women who experience post-abortion sequelae report suicidal ideation, with 28 percent actually attempting suicide, of which half attempted suicide two or more times. Researchers in Finland have identified a strong statistical association between abortion and suicide in a records based study. The[y] identified 73 suicides associated within one year to a pregnancy ending either naturally or by induced abortion. The mean annual

suicide rate for all women was 11.3 per 100,000. Suicide rate associated with birth was significantly lower (5.9). Rates for pregnancy loss were significantly higher. For miscarriage the rate was 18.1 per 100,000 and for abortion 34.7 per 100,000. The suicide rate within one year after an abortion was three times higher than for all women, seven times higher than for women carrying to term, and nearly twice as high as for women who suffered a miscarriage. Suicide attempts appear to be especially prevalent among post-abortion teenagers.(13)

INCREASED SMOKING WITH CORRESPONDENT NEGATIVE HEALTH EFFECTS: Post-abortion stress is linked with increased cigarette smoking. Women who abort are twice as likely to become heavy smokers and suffer the corresponding health risks. (14)

Post-abortion women are also more likely to continue smoking during subsequent wanted pregnancies with increased risk of neonatal death or congenital anomalies. (15)

ALCOHOL ABUSE: Abortion is significantly linked with a two fold increased risk of alcohol abuse among women. (16) Abortion followed by alcohol abuse is linked to violent behavior, divorce or separation, auto accidents, and job loss. (17) (see also New Study Confirms Link Between Abortion and Substance Abuse)

DRUG ABUSE: Abortion is significantly linked to subsequent drug abuse. In addition to the psycho-social costs of such abuse, drug abuse is linked with increased exposure to HIV/AIDS infections, congenital malformations, and assaultive behavior. (18)

EATING DISORDERS: For at least some women, post-abortion stress is associated with eating disorders such as binge eating, bulimia, and anorexia nervosa. (19)

CHILD NEGLECT OR ABUSE: Abortion is linked with increased depression, violent behavior, alcohol and drug abuse, replacement pregnancies, and reduced maternal bonding with children born subsequently. These factors are closely associated with child abuse and would appear to confirm individual clinical assessments linking post-abortion trauma with subsequent child abuse. (20)

DIVORCE AND CHRONIC RELATIONSHIP PROBLEMS: For most couples, an abortion causes unforeseen problems in their relationship. Post-abortion couples are more likely to divorce or separate. Many post-abortion women develop a greater difficulty forming lasting bonds with a male partner. This may be due to abortion related reactions such as lowered self-esteem, greater distrust of males, sexual dysfunction, substance abuse, and increased levels of depression, anxiety, and volatile anger. Women who have more than one abortion (representing about 45% of all abortions) are more likely to require public assistance, in part because they are also more likely to become single parents. (21)

REPEAT ABORTIONS: Women who have one abortion are at increased risk of having additional abortions in the future. Women with a prior abortion experience are four times more likely to abort a current pregnancy than those with no prior abortion history. (22)

This increased risk is associated with the prior abortion due to lowered self esteem, a conscious or unconscious desire for a replacement pregnancy, and increased sexual activity post-abortion. Subsequent abortions may occur

because of conflicted desires to become pregnant and have a child and continued pressures to abort, such as abandonment by the new male partner. Aspects of self-punishment through repeated abortions are also reported. (23)

Approximately 45% of all abortions are now repeat abortions. The risk of falling into a repeat abortion pattern should be discussed with a patient considering her first abortion. Furthermore, since women who have more than one abortion are at a significantly increased risk of suffering physical and psychological sequelae, these heightened risks should be thoroughly discussed with women seeking abortions.

NOTES:

1. An excellent resource for any attorney involved in abortion malpractice is Thomas Strahan's Major Articles and Books Concerning the Detrimental Effects of Abortion (Rutherford Institute, PO Box 7482, Charlottesville, VA 22906-7482, (804) 978-388 [sic].) This resource includes brief summaries of major finding drawn from medical and psychology journal articles, books, and related materials, divided into major categories of relevant injuries.

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THE NURTURING NETWORK: SERVING THE URGENT AND PRACTICAL NEEDS OF MOTHERS IN CRISIS

Personal Reflections of the Founder
Based upon Twenty Years of Compassion in Action

It is an honor to be invited to address you about a topic that matters more to me than any other. Instead of addressing the myriad of vital issues concerning the termination of life for an unborn child, let us focus today upon the life and well-being of another victim, the mother. I believe that it is time to shift our emphasis from the obvious harm that abortion causes an unborn child to the tragedy it inflicts upon the life of the mother.

Introduction:

My name is Mary Elizabeth Cunningham Agee. I am the mother of three children, one of whom died in a second term miscarriage twenty years ago on January 8th. It was this personal loss that riveted my heart and redirected my mind to the pivotal societal issue that we are addressing today.

You might appreciate knowing a little more about the person whose perspective you are about to hear. Please allow me to introduce myself:

Professional Background:

You may recognize my name as having been one of the first women in America to "break the glass ceiling" by serving in the Senior Management of two Fortune 100 Companies as the Vice President of Strategic Planning in the 1980's. I wrote a best-selling autobiography about my

experience at the Bendix Corporation and Joseph E Seagram & Sons and was twice voted by World Almanac as one of the "Twenty-five most influential women in America." I have been given the opportunity to share my thoughts about corporate culture, women in business and professional ethics at the Commonwealth Club, in the Wall Street Journal, Reader's Digest and Newsweek, and on many prime time television shows including Barbara Walters, Peter Jennings, Donahue, the Today Show and Good Morning America.

Educational Background:

My education includes a BA with Honors from Wellesley College ('73) where I was elected to Phi Beta Kappa and received two Danforth nominations in Moral Philosophy and Ethics. I have also earned an MBA from the Harvard Business School ('79) and studied Law and Jurisprudence at Notre Dame University and Trinity College in Dublin, Ireland. I have been awarded six honorary doctorates primarily for my work over the past two decades in trying to alleviate the suffering of thousands of women and children whose circumstances have caused them to be vulnerable to abortion.

Particular Expertise:

My primary expertise on the topic we are addressing today is based upon two decades of experience as the Founder and President of the Nurturing Network (TNN.) TNN is an international charitable organization comprised of over 42,000 volunteer resource members who provide for all of the urgent and practical needs of women with unplanned pregnancies. Over 17,000 pregnant women and unborn

children have been served through the practical compassion of the Nurturing Network during the past twenty years.

While I must admit that it took the personal anguish of a mid-trimester miscarriage for me to grasp the horror of prenatal death, it has taken the daily, life-saving activity of the Nurturing Network to teach me the importance of translating my reverence for human life into concrete action. This growing awareness enabled me to not look back for even one moment to the comfort and grandeur of an executive suite in midtown Manhattan. I chose to leave that way of life and a six figure salary for the far more rewarding and, I dare say, more vital work of managing and directing the Nurturing Network.

Viewpoint:

While TNN's mission has had nothing to do with debating the merits of abortion or trying to remove that alternative, the performance of my counseling role has required me to listen to the unsolicited testimonies of literally thousands of women. To a person, each woman has shared her profound regret and lingering emotional wounds as a result of an abortion experience. It is this unexpected, and yet, undeniable revelation that compels me to share what I have learned with you.

When the option of abortion was first presented for your consideration, scientific and anecdotal evidence was very limited. Since 1973, valuable medical and scientific research has been conducted and revealing anecdotal testimonies have been collected. The insights gleaned from these sources offer a compelling case for reevaluating a

procedure that was once considered to be a safe and private solution for women in crisis.

Unlike thirty years ago, we now have a generation of women who are prepared to open their private lives and expose their wounds in the hope that their experience might prevent others from the grief and emotional harm that they have known. I hope that you will agree that we cannot afford to turn a deaf ear to these women who provide such an eloquent witness to the dangers caused by a procedure made available to them in the hope of providing assistance.

At the close of my remarks, I will share several moving testimonies of actual TNN clients who profoundly regret their choice of abortion. Their words convey an anguish and loss that the passage of time or euphemistic rhetoric cannot repair. Their experience is a haunting reminder that what many once hoped would provide a "reproductive freedom" within a woman's "private choice" has, instead, resulted in a prison of tragic regrets for a generation of women who now know that they deserve better than abortion.

TNN Facts:

Approximately 50% of all TNN clients have already experienced at least one abortion at the time they contact us for help. This fact is revealed in either an initial toll free phone call requesting assistance, a referral from a local crisis pregnancy center, a first counseling session, or a confidential online questionnaire.

What the Clients Are Saying:

TNN clients express fear in having to "go through" another abortion. They candidly share their profound remorse and the conviction that they do not want to augment the emotional anguish they have already endured. They often share a sense of having been betrayed and then abandoned by those who convinced or coerced them into having an abortion.

It may be difficult to imagine how utterly sincere and blatantly honest these confidential counseling sessions are between a TNN counselor and a client. More often than not, I do not have the opportunity to meet a TNN client in person. Our relationship usually takes place in the relative privacy of a phone call or by internet which seems to afford more freedom to express what their hearts have wanted to say for many years. A bond of trust is readily established when a client discovers, often for the first time in her life, that TNN wants nothing from them: No fees, no baby to adopt, no promises, no work in exchange for our services.

To more fully understand the wrenching sadness and lasting regret that TNN clients describe following an abortion, it may be worth examining the forces and influences that drive a woman to make this choice: An immediate escape from shame, the possibility of enhanced economic security, the hope of saving a fragile relationship.

The actual testimonies of the betrayed and the abandoned in TNN's client files expose the miscalculations and illuminate the disillusionment that inevitably follows:

- Most women readily identify four primary sources of pressure or coercion that lead to an abortion "choice":
  - The father of the baby: "It is our relationship or the baby."
  - The parents: "It is either our financial support or the baby."
  - The boss: "It is either your job or the baby."
  - The peers: "It is either your social standing or the baby."

  Of course, none of these tradeoffs have anything to do with offering a woman in crisis the "freedom to choose." Each ultimatum threatens to impose an emotional toll calculated to force her to make a desperate choice. And yet, as the attached testimonies indicate, she alone will suffer the agonizing remorse, the hidden grief, the debilitating guilt.

- Most women who have chosen abortion do so not out of "freedom of choice" but out of a desperate sense that they have *no other* choice.

- Most women believe that the only "freedom" an abortion affords is experienced by those "significant others" who have much to lose if she continues her pregnancy.

- Most women express regret in having made the "choice" to abort and many become pregnant again in an effort to remedy their error and "recreate" their deceased child.

- Most women admit that very practical needs influenced their decision to abort a pregnancy. I have heard many say:

  "If only I had been offered an alternative educational opportunity; my peers were so cruel when they found out that I was pregnant."

  "If only I could have been given a different job; the father of the baby was my boss and I just couldn't put up with his ridicule and pressure every day at work."

  "If only I could have had a peaceful, affirming place to live; my parents were so disappointed in me that every day would have been emotionally devastating living at home."

  "If only I could have seen a good counselor to help me understand what I was about to do and what was at stake."

  "If only I could have had some financial support for college, rent and medical bills; my parents withdrew all support and I just couldn't make ends meet."

Listening to these women articulate what forms of practical support would have permitted their pregnancy to continue is how the Nurturing Network was actually formed. Before founding TNN, I interviewed and listened to hundreds of women who shared the practical needs that were not met when their own support networks let them down. These unmet needs had directly led to their abortion "choice" and helped to write the strategic plan that formed the Nurturing Network.

CONCLUSION:

There have been other times in history when a solution initially considered to be helpful or at least useful was eventually exposed as being dangerous and even harmful. It requires a certain humility, honesty and open mindedness to admit when a judgment must change in light of new and more compelling facts. This is what the women whose painful experiences are captured in the attached testimonies are calling for today.

The simple but profound truth is that abortion has not turned out to be the private, painless, safe solution that many had hoped it would be. Yes, it is quicker and seemingly less complex than alternative solutions. It surely is final. But the living testimonies of TNN clients reveals that this procedure, often sought in haste and without a full understanding of the emotional risks, has inflicted profound and lasting harm a generation of women. Their voices say better than anyone else ever could: Women deserve better than abortion. It is time for this tragedy to end.

I need only to reflect upon the thousands of women whom I have had the privilege of serving since founding the Nurturing Network to say with conviction that the binding of deep wounds and the healing of broken hearts is an intensely intimate and time-consuming process. In a society that prides itself on finding quick fixes and expedient solutions to any inconvenience or problem, it is understandable that we would seek a short cut to solve the crisis of an unplanned pregnancy. But time and experience reveal that no fast solution exists without causing profound and lasting harm to both the mother and the child.

The simple truth is that there is no efficient or effective substitute for what my two decades of experience tells me every woman in crisis yearns for most of all: Love and practical compassion. She does not seek our hand-washing absolutions or an easy means of hiding or "getting rid of her problem". A generation of women now courageously stands ready to tell us of a sobering reality: Abortion does not heal, it harms. It silences a beating heart...and breaks a mother's too.

ADDENDUM: FROM TNN CLIENT FILES

HEARTBREAKING:

TNN counsels thousands of post-abortive, grieving women. Here are several actual examples in each client's own words:

SARAH: TNN Valentine Card 2004

"I was not able to carry through with my pregnancy. I wanted to say, 'No," but couldn't gather the strength given the extreme pressures. I am completely overwhelmed with grief and depression beyond anything that I can describe. If only I had know about your Nurturing Network a month ago. I can't forget how exposed and humiliated I felt lying on that table. The pain, sense of loss and crippling nightmares just won't let up. I can't work and have lost my job. I have lost everything! Will there ever be peace for someone like me?"

TRACEY: "Heart to Heart" Newsletter, Mother's Day 1992

I read about your organization in Ligourian and it is as though a prayer was answered. I am twenty-eight and

gave birth to a son September 29, 1991. Since then I have been looking for an – outlet for my intense feelings and need to help someone else by sharing my personal experience in not going through with an abortion.

I was raped (the acquaintance variety) and have endured all of the post-traumatic syndrome symptoms. The father of the baby threatened to "throw me down the stairs" to get rid of 'it" when I told him I thought I was pregnant. I went to a clinic to find out for sure if I was pregnant and told their counselor what had happened to me. She assumed that I wouldn't want to keep the baby due to the situation and scheduled my appointment.

I drove directly to the father of the baby's apartment and on the way there, the light looked different. The sky was brighter. the clouds bigger and fuller, the sun more vivid than I remembered. I was slowly waking up from my shock and realizing I had a baby inside me . . . something I had wanted since I was nine years old. I had been in a relationship where the man couldn't have children and it nearly ruined us because I wanted children so badly, and here I was planning to get rid of one. I desperately wanted this man to marry me out of a sense of obligation as a father. After six hours of unsuccessful pleading, I left and planned to run my truck off a cliff.

Having been thoroughly humiliated and insulted. I turned to the man I left a year earlier (and still loved) and he helped me for the weeks and months it took to decide the fate of my child. He said to me. "We'll find a way. We'll make it work:" Hearing these words gave me strength and hope. and I've learned what a real father is. He's a man who fights for your life, makes life possible, and loves you in spite of everything.

I was lucky I know . . . not everyone has someone to turn to like your Network. But the point is the same, if you open yourself to the possibility of this incredible love that a child generates, people and things open up for you.

We have a beautiful, healthy, energetic. tranquil boy and there isn't a day that goes by that I don't think about what I almost did. Well, that is pretty much it. I would like to be able to share this and the rest of my experiences so that maybe someone in a similar situation can benefit sooner, and not go through the agony and torture I did. I would very much like to volunteer as an inspirational counselor and perhaps offer my services as an artist in some way. Please find a place for me as this would mean the world to me.

My son. Henry. has been on my lap for much of this letter and at three months, thinks he can type! Thank you for letting me share my story with you. Please call if I can be of help right away. Again, thank you for your organization. I wish I had known about you sooner.

JOANN: "Heart to Heart" Newsletter, Thanksgiving 1992

"In December, I lived through what today is so glibly referred to in the press as 'date rape.' Two weeks later I graduated with honors with a freshly minted MBA . . . only to have my dreams shattered. Any course of action, other than abortion, would have meant total abandonment by my family. When I asked for support, the aggressor accused me of 'emotional' rape and then abandoned me. I have kept this secret to myself until now.

Last fall I had surgery for ovarian cancer and am now unable to have children. When I die I will leave no legacy. Had I known about the Nurturing Network, I would have carried the child to term and my story would have had a happy ending. If I encounter someone in the future whom you may be able to help, I will tell them about your Network. If only I had known . . . "

TONI: "Heart to Heart Newsletter," Mother's Day 1993

"Ten years ago, Toni, married and a mother of two, found herself facing an unintended pregnancy. A baby simply did not fit into her career plans nor into her family's work schedule. Seeking the advice of her obstetrician, Toni was assured that an "early pregnancy termination" was the best alternative and that he had never heard of anyone having any adverse effects from this procedure. Tony [sic] chose to abort her baby and struggled with this decision for many years. Through painful years of grieving and professional counseling she now shares her heartache and hopes with Mary:

My wish is that I had known about The Nurturing Network. It would have taken so little to convince me to have our child. On this Mother's Day, I urge other abortion victims to come forth with their heartbreaking stories in the hopes of bringing an end to this national tragedy. I want to assure you that there is no need to suffer in silence anymore. Compassion, understanding and support is available and is only a phone call away."

JANE: TNN Valentine Card 1995

"When I found out that I was pregnant, I felt frightened and trapped. I felt that if I continued my pregnancy, I risked humiliating my family whom I love dearly. The thought of my boyfriend leaving me and the knowing looks of my friends at work was beyond anything that I could bear.

Deciding to end my pregnancy was the loneliest moment of my life. I knew then that this 'choice' would bring a sadness that would never leave me. A day doesn't go by that I don't think of what I lost. Perhaps it would help me to heal if I could encourage someone else who is feeling as desperate as I did. Please keep up the work you are doing! I only wish I'd known about you sooner."

MARGARET: TNN Valentine Card 1997

"Many years have passed since I was 23, frightened, unemployed and facing the stark reality of an unplanned pregnancy alone. I felt trapped with no idea of where to turn knowing that my family would be deeply humiliated and angry beyond words. I made the desperate choice to abort my son because I could think of no other way to go forward.

The pain of that choice will forever haunt me in the quiet moments of every day. Just last week I learned about your Network. If I could help even one mother who is feeling as desperate as I was, I would be so grateful."

JANET: TNN Valentine Card 1998

"On February 7, 1995, I had an abortion. One week ago, I picked up my sister's issue of Today's Christian Woman. As

I was flipping through the pages, I ran across your article and cried throughout the whole reading. I wish this article was put on every corner and available at every place that provides abortion. If only I had known about your Network, my baby could have been saved. I miss my baby so much. I think I understand how God is helping me to heal. I think He wants me to do something like you are doing. How can I help someone else avoid this pain and loneliness?"

KIM: TNN Valentine Card 1999

"Several years ago, I had a second trimester abortion. My uterus was punctured and emotionally I was devastated. Years of grief have taken their toll on me. I only wish I had known about the Nurturing Network back then. I am pregnant again and after many calls you are the only place that has given me hope. What a comfort it is to know there is an organization such as yours. I know that as I work through the practical needs of my pregnancy with your kind staff, I will be able to deal with the emotional wounds still scarring my heart."

MARTHA: TNN Valentine Card 2001

"Many years have passed since my senior year in college when I felt deserted by almost everyone important to me and made the desperate choice to abort my child. I could think of no other way to go forward. The fear that haunted me then was not being able to finish my education and fulfill my dream to become a teacher. The fear that haunts me now in the quiet of each day is that no matter what I accomplish professionally, I will never hear my child's voice or laughter. I can only hope that at least one mother

who may be feeling as alone and trapped as I was will read my letter. I am living proof that your work is needed."

THE HEALTH RISKS OF ABORTION
PANEL PRESENTATION FOR FAMILY RESEARCH COUNCIL BUILDING A CULTURE OF LIFE

Offered by Mary Cunningham Agee
President & Founder
The Nurturing Network
April 2002

"If only I had known." This is the haunting lament that I hear almost daily on the toll free crisis hotline of the Nurturing Network. Since founding this charitable organization almost twenty years ago, I have been invited by literally thousands of frightened, wounded women to understand the painful circumstances of their troubled lives. Let me assure you that they do not call to express satisfaction in their "reproductive freedom" to terminate the life of their unborn child. They call desperately seeking immediate, practical assistance in order to avoid an abortion procedure which almost half of our clients have already experienced in a prior pregnancy.

This is why the Nurturing Network was founded: to provide all of the practical support a mother in crisis needs in order to choose life for her unborn child. Our 32,000 member resources are located in all 50 states and in 27 foreign countries. We offer individually tailored solutions that include medical, emotional, financial, educational, employment and residential assistance to any woman whose own support network has let her down. I am happy to share that we have had the indescribable joy of assisting almost 15,000 mothers and children. Their personal stories and courageous testimonies are what have contributed to the insights that I am sharing with you today.

I must admit, therefore, that my perspective on the topic of abortion is about as detached or philosophical as that of a medic on the front line of an active combat zone.

I have come to know this topic up close and in living color through the tragic life stories of women who believed the marketing rhetoric about this allegedly sate [sic] and easy procedure. And yet, almost all of them would tell you that if they could erase just one decision in their lives, it would be the irreversible one that ended the life of their unborn child. Their grief is difficult to capture here in a few words because it is always tinged with a sense of having been betrayed. These women consistently describe the panic and loneliness that sets in when those whom she has trusted create fatal trade-offs between their role in her life and her child. How can she help but feel tricked and manipulated by boyfriends, parents, friends and employers who conveniently wash their hands of her maternal needs and choose to describe her unborn child as an inconvenience and even a threat. None of these accomplices, of course, will ever live out the permanent consequences of an abortion decision the way she will and so her sense of abandonment and isolation is profound.

While I am tempted to fill our time together with poignant anecdotes from our client files, I believe that an objective review of a few facts might be just as persuasive. The data that I am about to share has not been gleaned from biased sources, but rather, from medical and social scientists with no ax to grind. Their rather startling research findings only confirm what our common sense and the clients of the Nurturing Network have said for years: Abortion is far from being a safe procedure. It was, after all, this false assumption about the safety of this procedure that led the United States Supreme Court in to strike down every

federal, state and local law regulating its practice. The premise of their decision was that the advances of modern medicine had removed the need for any regulation of the procedure since it was now "relatively safe."

Clearly, the facts no longer support this assumption and, in fact, expose the glaring error at the root of our country's national policy toward abortion. The following data shows that abortion is actually dangerous to the health of women – both physically and psychologically – and, therefore, should be at least regulated if not outright prohibited.

The data that I am about to share was made readily available in a report generated by the Elliot Institute. While I cannot include all of the findings listed on their web site, I would like to acknowledge them for providing such well-documented statistical information. I will be drawing heavily upon this for the statistical part of my presentation.

National statistics on abortion show that 10% of women who undergo this procedure suffer from immediate complications. (1) Over one hundred different complications have been associated with induced abortion. "Minor" complications include: infections, bleeding, fevers, chronic abdominal pain, gastro-intestinal disturbances, vomiting, and Rh Sensitization. The nine most common "major" complications are infection, excessive bleeding, embolism, ripping or perforation of the uterus, anesthesia complications, convulsions, hemorrhage, cervical injury and endotoxic shock. (2) Can you imagine what an honest warning label might read like for such a procedure?!

While the immediate complications of abortion are usually treatable, these complications frequently lead to even more serious long-term reproductive damage.. For example, one

common outcome of abortion related infections is sterility. Researchers have reported that as many as 5% of aborted women are left inadvertently sterile. (3)The risk of sterility is even greater for women who are infected with a venereal disease at the time of an abortion.(4)

In addition to the risk of sterility, women who acquire post-abortal infections are five to eight times more likely to experience ectopic pregnancies.(5) In fact, between 1970 and 1983, the rate of ectopic pregnancies in the U.S. has risen four-fold! (6) It is worth noting that 12% of all maternal deaths are due to ectopic pregnancy. (7) And other countries who have legalized abortion have also seen the same dramatic rise in ectopic pregnancies. (8)

Cervical damage is another leading cause of long term complications following abortion. According to one hospital study, 12.5% of first trimester abortions required stitching for cervical lacerations. (9) Another study found that lacerations occurred in 22% of aborted women. (10) And women under the age of 17 have been found to face twice the normal risk of suffering cervical damage. (11)

Whether microscopic or macroscopic in nature, the cervical damage which results during abortion frequently results in a permanent weakening of the cervix. This weakening may result in an "incompetent cervix", a serious medical condition in any pregnancy that often results in miscarriage or premature birth. According to one study, symptoms related to cervical incompetence were found among 75% of women who undergo forced dilation for abortion. (12)

To put this risk in context, cervical damage from previously induced abortions significantly increases the risk of miscarriage, premature birth and complications of labor

during later pregnancies by 300 to 500%! (13) The reproductive risks of abortion are especially acute for women who abort their first pregnancy. A major study of first pregnancy abortions found that almost half, or 48%, of women experienced abortion-related complications in later pregnancies. Women in this group experienced 2.3 miscarriages for every one live birth. (14) And another researcher found that among teenagers who aborted their first pregnancies, 66% subsequently experienced miscarriages or premature birth of their second pregnancy. (15)

When this risk of increased pregnancy loss is projected on the population as a whole, it is estimated that aborted women lose 100,000 "wanted" babies each year due to latent abortion morbidity. (16) In addition, premature births, complications of labor, and abnormal development of the placenta all can result from latent abortion morbidity and each are leading causes of handicaps among newborns. (17) Considering premature deliveries alone, it is estimated that latent abortion morbidity results in 3000 cases of acquired cerebral palsy among newborns each year. (18) And, finally, since these pregnancy problems pose a threat to the health of the mothers too, women who have had abortions face a 58% greater risk of dying during a later pregnancy. (19)

There are similar shocking statistics that expose the serious psychological risks associated with abortion. Since this topic has been assigned to Dean Gladys Sweeney, I will not cover this topic in my remarks. But I cannot conclude my thoughts without at least stating that the emotional scars of this decidedly unsafe procedure are every bit as devastating as the physical ones we have just discussed.

It is my hope that by sharing this data, you will be moved to inform others who are at risk for an abortion procedure. It is a cruel and unconscionable for any of us to remain silent in the face of new scientific evidence that undeniably points to the health risks of this procedure for women. It is time for those in a position of policy-making power to correct the errors of the past and protect the next generation of women from further exploitation and damage.

Thank you.

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Parts of the following are excerpted from an essay written by Peggy Hartshorn, Ph.D., President of Heartbeat International, published in Back to the Drawing Board: The Future of the Pro-Life Movement, Teresa R. Wagner, ed., (South Bend, Ind.: St. Augustine's Press, 2003).

Pregnancy Help Centers: Prevention, Crisis Intervention, Healing: Putting It All Together by Peggy Hartshorn, Ph.D.

The burgeoning numbers and types of alternatives to abortion services and affiliating organizations also tell much about our response to the devastating effects of abortion. The first printed (i.e. mimeographed) directory of contact names and semi-organized centers in the United States contained about 75 entries. The most recent Heartbeat International Directory contains 3,471 entries in the U.S. Approximately 2,026 are pregnancy centers (about 479 of which have added medical services), and about 80% of those are members of one or more of 9 affiliating organizations: *Baptists for Life*, Grand Rapids, MI; *Birthright*, Atlanta, GA; *Care Net*, Sterling, VA; *Christian Life Resources*, Milwaukee, WI; *Heartbeat International*, Columbus, OH; *International Life Services*, Los Angeles, CA; *National Institute of Family and Life Advocates*, Fredericksburg, VA; *National Life Center*, Woodbury, NJ; and *Save-A-Life*, Birmingham, AL.

The rest of the entries consist of 507 professional social service agencies, such as Catholic Charities, also known for providing alternatives to abortion; 319 Christian maternity homes; 166 non-profit, Christian adoption agencies; 27 hotlines; and 54 independent post abortion programs (the vast majority are housed within pregnancy centers).

The History of our Network

The types of organizations reflect our response to the women, girls, and families who have been coming to us for help for over 30 years. In the late 60's and 70's we presumed these women were in short term crisis. Now we recognize them as the walking wounded who need much more than simple crisis intervention.

The birth of pregnancy centers in the U.S. was not a result of *Roe v. Wade* but of the earlier movement to liberalize abortion laws state by state. Concerned people realized that with the carefully crafted message that abortion was sometimes the reluctant, humane, even loving choice; some women would be influenced to abort their babies unless they had help and support. The work was generally seen as service, a humanitarian effort, an outreach of one caring individual to another, although the motive was from deeply held religious values and beliefs.

The first formal alternatives to abortion service organization was Birthright, founded in Canada in 1968.[i] Centers using the Birthright name soon spread to the United States. A strict Charter, established in 1971, is still followed by all Birthrights. Their vision was that you could not save the baby without "saving" (or serving) the mother, and vice versa.

A similar woman-and-baby-centered vision was held by the Alternatives to Abortion, formed in 1971 (now known as Heartbeat International) in the United States.[ii] The founders established a loose federation of independent organizations that could network with and learn from each other. This seemed right for the entrepreneurial United States, where a variety of small organizations had already sprung up, starting in the late 60's, from California to New

York, some operating out of pro-life doctors' offices, churches, or even homes.

While AAI often called itself the "service arm of the pro-life movement," they and Birthright considered themselves quite distinct from Right to Life, the lobbying and educational arm. Their role was primarily "crisis intervention." Once the woman knew she had a friend and could be connected, by referral, to a variety of services in the community (medical care, housing, material aid, and social services), the presumption was that their work had been a "success." The mother was safe, and therefore the baby would be safe.

By the 1980's and certainly in the 1990's, as abortions continued and affected not only women but everyone connected with them, as the culture became more accepting of "sex for recreation," as sexually transmitted diseases surged and AIDS emerged, as marriage declined and the disintegration of the two-parent family continued, the "disconnect" between the original theory and reality became evident.[iii] In response, new values and visions within the pregnancy center movement emerged.

The Baby-Centered Vision: The first influence was the baby-centered approach. It soon brought centers, in general, into disrepute, but eventually led to a movement from within toward real credibility. In the late 1970's, perhaps due to frustration that the lobbying and educational branch had not passed a Human Life Amendment and abortion numbers were skyrocketing, a more pro-active influence came into the pregnancy center movement. Centers were urged to advertise alongside abortion clinics in the yellow pages (the phone book indexes referred readers to the same headings, such as Clinics and

Birth Control Information, for both abortion services and abortion alternatives), show slides to clients of fetal development and aborted babies, and, in general, use every possible method to save the baby at risk for abortion. A small number of "Problem Pregnancy Centers" influenced by this approach emerged.[iv]

In 1987, an orchestrated effort by Planned Parenthood resulted in television and magazine exposés on these centers. Stories, written by undercover reporters posing as clients and using hidden cameras and tape recorders, ironically faulted the centers for not being totally "up front" and transparent.[v]

Congressional hearings were held, but pregnancy centers were forbidden from testifying in their own defense, so, in the public arena, pregnancy centers had a "black eye." Many involved in centers felt the embarrassment and shame, and supporters began to wonder if their own center was operating unethically. Centers began to be suspicious of each other. The boomerang effect even caused some to think they needed to "warn" potential clients, in ads and on the phone, of their pro-life values. Client numbers decreased in many areas.

The attacks resulted not in the end of pregnancy help centers, the intention of our opponents, but eventually in strengthening of the centers. In 1993, NIFLA, the National Institute of Family and Life Advocates, was founded specifically to provide legal education and training to help centers become more professional and protect themselves from frivolous tort claims (such as assault and battery for touching a client without her permission), and NIFLA spearheaded the development of the first insurance program to protect centers for "counselor liability."[vi]

The Medical Vision: Some centers in California had been accused of "practicing medicine without a license" for providing urine pregnancy tests, and pro-choice wordsmiths began to label all centers "fake clinics." Meanwhile, in the medical field, ultrasound was emerging as a new diagnostic tool for pregnancy. NIFLA soon envisioned real clinics not only doing pregnancy testing but also using ultrasound to diagnose pregnancy, and pioneered a medical model for centers either licensed by the state or working under the license of a private physician. The potential of ultrasound to help abortion-vulnerable mothers bond with their babies was clear.

More and more centers today are adding ultrasound services for abortion-vulnerable clients. True to their entrepreneurial nature, centers are taking the original model even further, with some adding STD testing, pap smears, natural family planning, prenatal care, birthing centers, and even well baby care. Some are becoming "hub" medical clinics and encouraging other centers to refer clients to them for ultrasound and other medical services. As we partner with doctors, nurses, and other medical personnel to bring a more pro-life and holistic approach to the care of women, we are beginning to see a ripple effect influencing the medical community.

Ironically, the original baby-centered approach, that provided ammunition to discredit centers, eventually led to more professionalism and credibility. Ironically too, our opponents certainly hoped to eliminate all baby pictures. Instead, still pictures have been replaced by images of "live action" ultrasound provided by licensed medical personnel that allows women not only to have an accurate diagnosis of pregnancy at a very early stage (thereby

helping their decision-making process), but also to bond with their babies in utero.

In the early 1980's, Evangelical Christians came into the pro-life service movement in large numbers, and they were a "breath of fresh air" to those who had been carrying the ball since the late 60's. Christian Action Council (CAC) had been formed in 1975, primarily as a pro-life educational and lobbying organization, and it soon saw the need for pregnancy centers. Their first pregnancy center was opened in 1980. In 1984, CAC launched Sanctity of Human Life Sunday on the Sunday closest to January 22, in an effort to educate and motivate Evangelical churches nationwide. The service arm of this organization eventually took priority, the education and lobbying arm of CAC was eliminated, and CAC was renamed Care Net in 1994, to emphasize their network of renamed Pregnancy Care Centers.

The value of the work of pregnancy centers as Christian ministries has been enhanced by the involvement of Focus on the Family, which, in the 1990's, developed a program to support pregnancy centers with educational materials and a ministry office.

The Healing Vision: In the early 70's, we had begun to see clients who had already had one or more abortion and were thinking of another, and we had begun to be approached by post abortive women who wanted to help other women avoid the tragic mistakes they had made. The term "post abortion syndrome" had not yet even been coined. When we consulted professional counselors for help, they either denied that abortion had any ill effects or they cautioned us, as volunteers and nonprofessionals, not

to get involved for fear that post abortive women might become suicidal.

Early attempts were made in some AAI centers to create post abortion programs that were "nondenominational and nonsectarian." However, when centers were confronted with the need for post abortion healing programs, many moved from the service model to a ministry model, realizing that they had to choose a basis for their program and the obvious choice was Biblical. As a result, pregnancy centers have been pioneers in developing post abortion programs for men and women that take the form of support groups, Bible studies, or one-on-one discussions. Organizations have formed whose sole mission is to provide and promote post abortion programs, many of which have their roots in pregnancy centers.

We have also come to realize in pregnancy centers that almost all of our clients have broken sexual integrity. They are wounded by casual sex and broken trust, sexual abuse, incest, date rape, and/or abortion. By the 1980's and certainly by the 90's, most of our clients had grown up in a post Christian era. Most were not even born in the "quaint" time when abortion was illegal and marriage was the default option if there was a crisis pregnancy. Crisis intervention alone is sometimes effective in keeping such clients from jumping off a cliff (i.e. not choosing an abortion), but they are still left with broken limbs and severely damaged internal organs, like broken hearts and souls. Life change and healing are necessary. Our centers have sometimes become "revolving doors," where clients come back time and again for pregnancy tests. Providing ongoing support, education, and healing is becoming a priority in our movement, and new programs are being

introduced in an effort to provide healing and restoration so clients can actually regain their sexual integrity.

The Prevention Vision: Abstinence education, like post abortion healing, also had its beginnings in pregnancy centers, since we had to develop an approach when the client had a negative test, a more common result than the positive test. In the 1980's, as we witnessed more and more clients with multiple sexual partners and sexually transmitted diseases, it became clear that we needed to move the abstinence message outside the pregnancy center, and especially into the schools. All over the country, entrepreneurial center volunteers and staff who had a heart for prevention began to give classroom presentations and inspirational assemblies. Abstinence curricula and speakers began to proliferate and many centers started abstinence education programs in schools and in the community and consider "prevention" a major part of their mission.

Tax-funded abstinence education programs, have expanded dramatically and reached more and more schools and communities (and teen pregnancy and sexual activity rates have declined.). Pregnancy centers have been pioneers in the abstinence field. Many centers now have a prevention program that is equal to or even greater in scope and funding than their crisis intervention program, and some of the best national abstinence education programs have their roots in our centers.[vii]

The Marriage Vision: We have not ignored the growing evidence, placed before our eyes in the person of our client, that the deterioration of marriage in our culture over the past 30 years has led to a dangerous situation for single mothers and their children. The statistics are

overwhelmingly convincing that children raised with both biological or adoptive parents do best in terms of economics, education, physical and mental health, and many other factors related to security and happiness. Children do the least well in all of these measures when raised by single mothers where the fathers are absent. While we have always upheld the value of adoption and marriage, few of our clients choose marriage or adoption. For many of them, raised in an era in which divorce is rampant and co-habitation is common, marriage is a foreign concept.

Many centers are experimenting with programs and materials to get the fathers committed to being involved during the pregnancy and after the baby is born. For example, the founder of Boston's "A Woman's Concern Pregnancy Health Centers," a Baptist minister, initiated a program called "Dad's the Man" to envision males about their role as husbands and fathers. As a result, the pastor has been asked to officiate at several marriages of center clients. The movement is committed to trying to help turn the tide back toward marriage (and adoption), toward more security for both women and children.

Today

We have grown tremendously in terms of numbers and kinds of centers, of professionalism, of breadth and depth of programs (prevention, intervention, healing). Sadly, our growth has mainly been due to the increasingly devastating effects of abortion (and related sexual mores) in our culture, as more and more wounded and scarred women (men and children) seek us out for help and we respond to the needs. We are seeing more and more casualties inside our pregnancy centers.

Today, pregnancy centers offer many services including, but certainly not limited to, pregnancy tests, material help, maternity clothing, baby items and parenting classes. They offer referrals for adoption, medical care, childbirth classes, legal assistance, financial assistance, housing, and many other services that women facing an unexpected pregnancy need. And it's all provided at no cost. Our volunteers come alongside women and offer solutions that women can live with. As a society, we can do better than to tell a woman that her only option is to take the life of her child. A caring society reaches out and helps those mothers who are in a difficult situation. Rather than telling her that her solution is to kill her child, our centers provide real, practical help so that she can choose life for her child. If a woman is feeling pressured into an abortion by those around her, or by financial circumstances, she isn't really being given a "choice." Our centers are striving to change that.

Many of our centers are branching out in an effort to meet the needs of women by providing ultrasounds, STD testing, prenatal care, natural family planning, abuse recovery, and post abortion programs.

What ties all of the diverse centers together in the alternatives to abortion movement is sexual integrity, whose absence is the root of abortion. By sexual integrity, we mean that sexual relationship, unconditional love, marriage between man and woman, children, and God, all go together. If we try to remove one of these from the equation we have almost all of the modern social ills (abortion, but also rampant divorce, co-habitation, fatherlessness, STD's, loveless marriages, promiscuity, child abuse, and more). Sexual integrity is what all pregnancy centers are about: prevention, so sexual integrity is protected and

valued; intervention, when crisis occurs because sexual integrity is not being lived out; and healing, so sexual integrity can be restored.

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[i] Birthright was founded by the late Louise Summerhill in Toronto, Canada. The Birthright USA central office is located in Atlanta, Georgia.

[ii] AAI was founded in Toledo, Ohio, by the late John Hillabrand, M.D., an obstetrician/gynecologist, and Mrs. Lore Maier, an immigrant from Germany who had served as a court reporter at the Nuremburg Trials following World War II. Now called Heartbeat International, the central office is in Columbus, Ohio.

[iii] For research on the decline of the family and marriage, with attendant social problems, see a variety of papers by The Heritage Foundation, Washington, DC, www.heritage.org. For statistics on the rise of sexually transmitted diseases and AIDS, see studies by The Medical Institute, Austin, TX, www.medinstitute.org.

[iv] A manual, written by Bob Pearson over 20 years ago, which promoted this baby-centered vision, is still quoted extensively by NARAL on its web site to discredit pregnancy centers, even though most people in the movement have never even seen the manual.

[v] See "The Making of a Controversy: The History of the Conspiracy Against Pregnancy-Help Centers," a Special Report (vol. iii, no. 3) by Life Decisions International, Washington, DC. Also available on their web site at www.interlife.org.

[vi] Thomas Glessner, J.D. (chairman of the Board of the Seattle pregnancy center, victimized by the NARAL smear campaign of the 1980's) founded and still leads NIFLA, which has also published newsletters detailing the court cases brought against pregnancy centers.

[vii] For example, Abstinence Clearinghouse, the only national organization that tracks and evaluates all abstinence until marriage programs (and also publishes a Directory of these programs and holds annual conferences for abstinence education providers) was founded in 1997 by Leslee Unruh, also founder of the pregnancy center in Sioux Falls, South Dakota.

[LOGO] **Pregnancy Decision**

Health Centers

Annual Report
2003

[Excerpts]

OUR MISSION

The mission of Pregnancy Decision Health Centers is to empower individuals to make healthy life choices consistent with the intrinsic value of every human life.

We seek to provide caring services for responsible sexual values and alternatives to abortion to as many individuals as possible in the central Ohio area. We focus especially on individuals considering abortion because they lack information or support. We do this through programs which provide pregnancy testing and intervention; pregnancy confirmation through medical examination and ultrasound; mentoring and nurturing support; linkage to community resources; education and training; post abortion support; adoption support; material aid; housing referrals for pregnant girls and women; and abstinence education in the community.

We provide consultation to groups who share our vision, and we serve as a leader in the community and movement at large for responsible sexual values and alternatives to abortion.

OUR PRINCIPLES OF SERVICE

1. Services promote life-affirming choices for pregnancy and sexuality.
2. Services are presented in a loving, caring, nonjudgmental manner.

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3. Services are presented to people of all races, cultures, and creeds.
4. Services are confidential.
5. Services promote abstinence as the positive life choice for unmarried persons.

OUR VALUES

1. Sanctity of every human life
2. Chastity (abstinence outside of marriage; faithfulness within marriage)
3. Marriage and Family
4. Personal responsibility
5. Self-help
6. Dignity of work
7. Knowledge and wisdom
8. Community
9. Church.
10. Prayer

These values are rooted in and flow from the Christian faith of PDHC Board, Staff, and Volunteers.

HISTORY OF PREGNANCY DECISION HEALTH CENTERS

PDHC exists today because of the dream of a few couples in 1978. Since then, so many others have made this dream their own. These founding couples had helped pregnant women in their own homes, but knew more had to be done. With $500 and 10 volunteers, their vision, to reach out with loving and practical alternatives to abortion, was realized with the opening of our 1st client office

and 24-hour Hotline in January, 1981. The first year God blessed their efforts with 3,109 client visits and calls, and they knew this was the beginning of a local mission effort to extend help to girls and women in need.

Over the next 23 years our programs of help and support expanded along with the numbers of volunteers, supporters, and crisis intervention offices. In 2003 PDHC operated 5 health services offices, a 24 hour hotline, two ultrasonography medical clinics, a post-abortion healing program, abstinence education, and several continuing care programs to meet the physical, emotional and spiritual needs of mothers, fathers, and babies, both born and unborn. As a result, trained staff and volunteers served 19,616 individuals with health services and 14,371 students with abstinence education services in 2003, **a record number.** A key to our health and growth has been the commitment to good stewardship of the funds entrusted to PDHC by our donors, most of whom are individuals and families. **Due to the generosity of donors and volunteers, our services have always been provided at no cost to teens, women, and men who seek our help.** The following chart is a window into our history.

	1981	**2003**
# of People Served	3109	33,987
# of FT & PT Paid Employees	0	32 FTE 27.5
# of Volunteers	10	286
# of Offices	1	5
Since our inception, approximately 3000 abortion-vulnerable women have chosen life for their children		

With each new client need, PDHC strategically answered with a creative new service. The three most noteworthy in our history were the purchase of the Chrysalis House in 1990, the opening of our own Medical Clinic in 1995, and the initiation of an abstinence until marriage education program in the public schools in 1998.

The purpose of the Chrysalis House was to have a place for our Life Plan program to provide prenatal, parenting, and life-skills education. This program, (formerly "Partners") was recognized by the Ohio Department of Health for our excellent work with mothers with a high-risk of an unhealthy birth.

The opening of our Medical Clinic was as instrumental to our life-affirming ministry as the opening of our first office. The Clinic is staffed with volunteer physicians, sonographers, and nurses who provide pregnancy confirmations, physician consultations, and ultrasounds to women considering abortion. The powerful truth of the ultrasound picture has resulted in many abortion-vulnerable clients choosing life for their babies. Since 1995, we have seen more than 2,368 of our most abortion vulnerable clients at the clinic.

1996 marked another significant advancement in our work, with a nurse manager overseeing each neighborhood office and the medical clinic. The nurse managers and health service volunteers invite local medical & social service providers and the local church to join in providing for the needs of clients who visit PDHC.

Reestablishing an abstinence education program in the school system became an obvious need as we constantly counseled with single girls and women in our offices who had never had anyone speak to them of the advantages of

abstinence to their physical and emotional health. We understand that we are fighting an uphill battle, as we try to undo the false message of 'safe sex' and 'condom use' that Planned Parenthood and others have indoctrinated into students, parents, and educators for more than 40 years.

Since our inception, at least 3,000 abortion-vulnerable women have chosen life for their child, and an additional 3,000 women who were struggling with an abortion decision decided to consider other options. Hundreds of women have been emotionally restored from a previous abortion decision, thousands of women and students have made a commitment to end destructive sexual activity, many have opened their hearts to God's love, and thousands more have benefited from our programs.

In our 1999 strategic plan we addressed a concern that we had become too inwardly focused and allowed the huge social service needs of our clients to shift our priorities away from the abortion vulnerable client. We committed to reevaluate our programs and return our priorities to the original vision of:

- Seeking to provide caring services for responsible sexual values and alternatives to abortion to as many individuals as possible in the central Ohio area.
- Focusing especially on individuals considering abortion because they lack information or support.
- Providing consultation to groups who share our vision, and serving as a leader in the community and movement at large for responsible sexual values and alternatives to abortion.

As we entered the new century, we remained committed to constantly reviewing our locations and services and

adjusting to serve the needs of the community. In 2001, we opened a new flagship center/north office, we revamped our programs and services consistent with our mission, adjusted our office hours to better meet client needs, added professional hotline staff, reached out to churches to partner with us in serving client support and healing needs, expanded our school abstinence program, upgraded our volunteer training program, and recommitted to assisting other groups who share our vision, partnering with Heartbeat International to train pregnancy center workers nationally and internationally.

In 2001, we also began a growth campaign, *Legacy of Life . . . A Plan for Growth*, to purchase the building at 665 E. Dublin-Granville Rd. and expand our programs and community outreach. Through year-end we had received $690,000 in pledges.

In 2002, we began the initial stages of a new strategic plan, which calls for partnering with groups throughout central Ohio to reach any abortion-vulnerable person in this area. We also received a grant to expand our media outreach to abortion vulnerable girls and women, to purchase an additional ultrasound and expand medical clinic services by training an additional PT nurse in sonography in order to open a second location, and to expand our fundraising abilities. We served a record number of clients and students (28,737) and had a record 357 life decisions from abortion minded clients with another 293 saying they would reconsider their options.

During 2002, our founder and Board of Directors Chairman for 22 years, Peggy Hartshorn retired from the Board of Directors, moving to the Advisory Board and Emeritus Board Chairman. Longtime Board member, Linda Augspurger,

was elected Chairman, Executive Director Joyce Wilson became President and Debra Neybert became Executive Director, as we restructured our staffing to accommodate the significant growth we have experienced. We moved into a new phase of development that always occurs when a founder retires.

We reached a new milestone in 2003 when the Pregnancy Care Center of Fairfield County merged with PDHC, and in May we reopened their office which had closed in 2002. We began the 2nd phase of our Legacy of Life Growth Campaign. We opened a second medical clinic location at the East Office, and at the invitation of Christian Assembly Church, began planning our 6th office location at 4099 Karl Road (their former Christian School building) to open in 2004.

We enter 2004 in awe of what God has done and continues to do through thousands of faithful staff, volunteers, and donors over the past 23 years. **The Creator and Sustainer of all life is Faithful.**

HEALTH SERVICES CLIENTS

YEAR	HEALTH SERVICES CLIENT VISITS	HOTLINE CALLS	TOTAL NO. SERVED	YEAR to YEAR VARIANCE #	%
1981	309	2,800	3,109	-	-
1982	678	4,100	4,778	1,669	54
1983	1,010	4,500	5,510	732	15
1984	2,229	6,700	8,929	3,419	62
1985	2,892	8,600	11,492	2,563	29
1986	3,017	8,100	11,117	-375	-3
1987	3,320	8,700	12,020	903	8
1988	3,230	9,727	12,957	937	8
1989	3,344	9,270	12,614	-343	-3
1990	3,331	9,923	13,254	640	5
1991	3,833	11,805	15,638	2,384	18
1992	3,871	10,717	14,588	-1,050	-7
1993	3,919	10,841	14,760	172	1
1994	4,037	10,680	14,717	-43	-.2
1995	3,757	7,694	11,451	-3,266	-22
1996	4,045	9,451	13,496	2,045	18
1997	3,908	10,368	14,276	780	6
1998	2,810	8,933	11,743	-2,533	-17.7
1999	3,154	10,122	13,276	1,533	13
2000	3,227	10,810	14,037	761	6
2001	3,750	9,874	13,624	-413	-3
2002	4,432	14,554	18,986	5,362	39
2003	5,115	14,501	19,616	630	3
TOTAL	74,245	212,770	287,015		

CLIENT VISITS BY OFFICE

YEAR	EAST	WEST	NORTH	OSU	GERMAN VILLAGE	LANCASTER
1991	16%	14%	7%	8%	55%	
1992	15%	13%	7%	9%	56%	
1993	14%	14%	8%	8%	56%	
1994	15%	11%	8%	9%	57%	
1995	14%	15%	8%	11%	52%	
1996	15%	11%	8%	12%	54%	
1997	21%	11%	2%	16%	49%	
1998	23%	11%	NA	22%	44%	
1999	23%	13%	NA	19%	45%	
2000	19%	3%	1%	25%	53%	
2001	19%	NA	17%	23%	41%	
2002	17%	NA	29%	19%	34%	
2003	17%	NA	37%	18%	27%	96 clients

*** Lancaster Office Open May through December of 2003 - Served 96 Clients**

REASON FOR HEALTH SERVICEVISIT

YEAR	TEST OR SUPPORT	MATERIAL AID	OTHER	TOTAL # CLIENTS
1991	87%	11%	2%	3833
1992	82%	13%	5%	3871
1993	87%	9%	4%	3919
1994	83%	10%	7%	4037
1995	83%	10%	7%	3757
1996	83%	10%	7%	4045
1997	87%	7%	6%	3908
1998	84%	10%	6%	2810
1999	83%	10%	7%	3154
2000	83%	12%	5%	3227
2001	89%	9%	2%	3750
2002	78%	12%	10%	4432
2003	77%	12%	11%	5,115

HEALTH SERVICES CLIENT DEMOGRAPHICS

RACE	2000	2001	2002	2003	EDUCATION	2000	2001	2002	2003
White	54%	52%	47%	48%	< High School Grad.	33%	33%	35%	33%
Black	39%	42%	41%	45%	High School Grad or >	62%	67%	65%	67%
Other	7%	6%	8%	7%					
INCOME					MARITAL STATUS				
					Single	78%	82%	76%	83%
Dependent	24%	32%	30%	30%	Married	17%	18%	16%	17%
< $10,000	26%	29%	20%	28%					
> $10,000	34%	35%	35%	34%	AVERAGE AGE	22.4	22.5	22.7	22.9

2003 HEARTS CHANGED/ LIVES SAVED
HEALTH SERVICES OFFICES-CRISIS INTERVENTION

DESCRIPTION	1999	2000	2001	2002	2003
# of clients seen	3154	3227	2997	3883	3918
# of pregnancy tests performed	2707	2686	2452	2910	2805
Ab-minded or und before test	590/22	662/25	722/29	882/30	1090/39
Abort/Und before test who tested +	271	365	315	402	501

*PDHC had **4** offices in 1997,1998, 1999, **3** offices in 2000, **4** offices in 2001 & 2002, and **5** in 2003.

MEDICAL CLINIC CRISIS INTERVENTION

DESCRIPTION	1999	2000	2001	2002	2003
# of days clinic open	40/77%	45/85%	77/92%	144/91%	**159**/88%
# of clients scheduled	412	672	661	1027	**1034**
No shows	216 /52%	348/52%	347/52%	458 /45%	**532**/51%
Clients seen	182 /44%	324/48%	317/48%	549/53%	**502/49%**
Decision after follow-up					
"I will parent"	78 /43%	141/44%	168/54%	265/48%	**231**/46%
"I will make adoption plan"	1 /0%	6/2%	6/2%	3/1%	**6**/1%
"Undecided/considering other options"	14 /8%	52/16%	16/5%	97/18%	**25**/5%
Still planning to abort	20 /11%	33/10%	46/15%	62/11%	**42**/8%
Miscarried/not pregnant	9 /5%	14/4%	10/3%	28/5%	**20**/4%
Not reachable	60 /33%	82/25%	68/22%	96/17%	**183**/36%

HOTLINE CRISIS INTERVENTION

DESCRIPTION	1999	2000	2001	2002	2003
Total # of Calls	10,060	10,810	9,874	14,554	14,501
Total # of Client Calls*	7,983	8,469	7,282	10,679	12,556
Total # of New Contact Calls**	4,439	4,327	3,778	5,761	5,811

Other PDHC Programs at a Glance

Program	1999	2000	2001	2002	2003
Material Aid					
# of Clients Receiving a Baby Layette	167	238	201	283	327
# of Clients Receiving Maternity Clothes	160	143	137	259	323
H.E.A.R.T.(Post Abortion Recovery Workshops)					
# of Workshops Held	7	15	17	13	8
# of Women Attending a Workshop	30	65	71	48	45

Healthy Choices Abstinence Program

	/99 (3 mos.)	1999/2000 school yr.	2000	2001	2002	**2003**
Students served	939	8428	8242	10,005	10,681	11,946
Total encounters		23,273	29,925	20,556	65,003	59,730
Average # of encounters		2.76	3.63	2.5	6.09	5
Teachers	51	460	622	859		
School systems	2	4	8	14	13	16
Total Middle Schools	3	4	7	13	20	27
Total High Schools	2	8	14	21	22	25
Elementary Schools		6	6	4	0	0
Other		2		15	2	2
Private Schools		1	2	8	2	2

Total Students served 2002/2003 School Year -- 14,371

P.D.H.C. OVERVIEW STATS

Services	2000	2001	2002	2003
Clients seen-Client Offices	3188	2997	3883	3918
Pregnancy tests	3071	2452	2907	2805
Abortion vulnerable before test	599	722	847	1090
Still Abort. Vul. after counseling	307	255	310	346
Pregnant clients making adoption plan	10	11	10	14
Clients affiliated with Christian church	1178	1719	2460	2104
Clients reporting past abortions	386/12%	441/15%	545/14%	558/14%
Clients with unresolved feelings/regret	210/54%	234/53%	313/57%	308/55%
Clients seen at medical clinic	324	317	549	502
Still Abort. Vul. after follow-up	85/26%	62/19%	159/29%	67/13%
Hotline calls	10,201	9,874	14,554	14,501
Total client calls	7,282	8,723	10,858	12,556
Client calls from Yellow Pages	2,690	2,281	1,862	1,850
Client calls from TV, Radio, & Billboard			1,357	913/70/98= 1,081
Abortion Related Calls	1997	1961	2,524	3,177
Life Decisions			357	453
Spiritual Discussion		821	1,804	2,045
Shared Christ			187	475
Clients who Accepted Christ				54
Maternity clothes clients	137	152	259	323
Baby layettes provided	227	201	283	327
H.E.A.R.T. (Post-Abortion Healing)	58	71	48	45
Students served in abstinence programs (school year)	8,242	10,005	10,681	14,371
Teachers served	622	859		
Schools Served	42	62		56
Volunteers	300	320	260	286
Dollar value of volunteer hours	$204,354	$223,963	$170,573	$135,709
Dollar value of staff donated hours		$45,269	$ 58,121	82,932
			TOTAL	$218,641

PREGNANCY DECISION
HEALTH CENTERS

BOARD REPORT
3rd Quarter 2004

Presented to the Board of Directors

PDHC OVERVIEW STATISTICS

SERVICES	2003 Totals	1st Qtr 2004	2nd Qtr	3rd Qtr		
Client visits-Client Offices	3918	1129	1199	1195		
Pregnancy test	2805	677	726	727		
Abortion vulnerable clients	1090	426	462	449		
Birth Control Failures		360	345	392		
Abstinence Counseling		414	428	426		
Still Abort. Bul. After counseling	346	150	162	192		
Pregnant clients making adoption plan	14	4	4	1		
Clients affiliated with Christian church	2104	571	560	534		
Clients reporting past abortions	558/14%	135	138	104		
Clients with unresolved feelings/regret	308/55%	87/61%	89/65%	51/77%		
Clients seen at medical clinic	502	154	146	102		
Still Abort. Vul. After follow-up	67/13%	17/11%	16/11%	25/25%		
Hotline calls	14,501	3765	3692	3860		
Total client calls	12,556	3158	3167	3352		
Client calls from Yellow Pages	1,850	523/17%	553/17.5%	621/18.5%		
Client calls from TV, Radio, & Billboard	913/70/98=1,081	75	72	54		
Abortion Related Calls	3,177	815/26%	699/22%	761/23%		
Life Decisions	453	165	118	86		

Description	1st Qtr	2nd Qtr	3rd Qtr	4th Qtr	2003 Totals	2002 Totals
Religious Affilitation	#reporting	#reporting	#reporting	#reporting		2002
• None	216	265	209	211	901	994/26%
• Non-Christian Religion	35	47	44	33	159	184/5%
• Christian	508	556	578	462	2104	2460/63%
Spiritual Interaction & Resources Given						
Opportunity to share Christ	37	56	84	34	343	187
General Spiritual Discussion *	388	504	516	154	2045	1804
Client Accepted Christ	7	10	7	8	32	27
Unsure if client accepted Christ						53
Client already a Christian	172	293	*			1127
Church Referrals Given	94	101	112	103	417	437
*couldn't find this stat in Access						
Past Abortions						
#/%Clients Reporting Past Abortion(s)	166/16%	168/16%	118/14%	106/12%	558/20%	545
%reporting unresolved feelings or regret	70/48%	85/52%	77/54%	76/72%	308/55%	313/57%
#/%requesting contact about HEART (interest)	80/55%	79/46%	56/40%	49/46%	264/47%	169/31%
Material Aid/Service						
Layettes	73	91	77	86	327	283
Maternity Clothes	59	85	86	93	323	259
Preg. Verification	49	49	72	70	240	150
Walk-ins	498	516	557	410	1981	2179
Appts. Made from Hotline		611				2367
Appointments	344	463	470	482	1759	1498
New Clients	551	608	738	536	2433	2092/54%
Previous Clients	288	372	385	416	1461	1603/41%
Demographics						
Single	639	748	639	398	2424	3023
Married	139	131	147	96	513	669
Black	329	412	357	278	1376	1575
White	343	398	397	347	1485	1796
Other	61	81	65	20	227	291

[LOGO]

The Ministry of Care Net

Care Net is one of the largest pro-life organizations in the evangelical network of pregnancy centers in North America, helping to save over 100,000 babies from abortion each year. Care Net represents about 2,400 paid staff, 5,000 board members and over 450,000 volunteers. This team of dedicated Christians is ministering to over 250,000 young women who come to the centers each year, struggling with the fear of being pregnant and alone.

Care Net has been promoting, equipping and developing pregnancy centers for over twenty years. We support over 800 pregnancy centers across the United States and Canada.

Care Net's pregnancy centers are building a culture of life in this nation in three primary areas:

- Prevention
- Intervention
- Reconciliation

Prevention

Committed pregnancy center staff and volunteers presented the message of sexual abstinence to over 800,000 students in classrooms and civic organizations across North America in 2003. In addition, the individual clients of pregnancy centers received lifestyle counseling, emphasizing the importance of sexual abstinence until marriage. Pregnancy center volunteers engage in honest dialogue, encouraging their clients to recognize their self-value and make a plan for purity in their lives.

Intervention

For more than twenty-eight years, Care Net has assisted hundreds of pregnancy centers in becoming life-protecting shelters of hope to women trapped in the despair of an unplanned pregnancy. Life affirming options such as parenting and adoption are presented with care and compassion to women, men and families in need. Tangible helps such as material assistance and limited medical care are offered to the financially challenged. Care Net's pregnancy centers provide educational classes on childbirth and parenting. Many pregnancy centers also offer job skills training by way of computer classes. All the services provided by Care Net's pregnancy centers are free and confidential. Pregnancy centers are impacting our nation for good.

Reconciliation

Beneath the patina of reproductive rights lies three generations of women, men and families that have suffered the emotional trauma of a past abortion. Approximately 3,750 abortions occur daily in this country. Of this number, 43% of these abortions are sought by women who identify themselves as Protestant and 27% from women who are Catholic. Women who identify themselves as Christians obtain two-thirds of the abortions in America. Equipping pregnancy centers to minister effectively in the area of post-abortion recovery is a primary mission of Care Net. In the words of many women and men who have sought relief from the aftermath of abortion,

"No one ever told me I would feel this way."

Four hundred and fifty-four Care Net pregnancy centers offer recovery support groups to women and men who have experienced the trauma of a past abortion. Care Net has produced vital post-abortion resources, leadership training and cutting edge information for our network of pregnancy centers to utilize with their clients, and cultivate the emotional healing desired after an abortion occurs.

In 2004, **101,000** women and **2,710** men participated in Care Net pregnancy center post-abortion counseling and education support groups in this nation. Women and men experiencing post-abortion grief report an increase in alcohol and drug use, episodes of crying, nightmares, or anger with those involved with the abortion. The last stage of grief is acceptance.

Post-abortion counseling and education support groups enable women and men to restore the value of their children who were lost to abortion. Through post-abortion support groups, women and men experience forgiveness, expressing gratitude for a safe environment in which they can express their grief.

As of March 19, 2003, Care Net's affiliates have responded to at least one survey in the past year. Of the affiliated organizations that have responded to our surveys, 75% indicated that they had a post-abortion support group for women.

Care Net Programs

The Option line

The Option Line call center is operated and managed by Care Net and Heartbeat International. It is our newest effort to provide women in crisis with real help 24 hours a

day, seven days a week. The Option Line is serving 3,500 women each month. Six out of ten women who call this help line are considering abortion.

The Option Line provides:

- 24/7 phone coverage
- Bilingual consultants
- Computerized center locator system
- Calls patched through to nearest center

The Urban Initiative

Care Net is planting new pregnancy centers in urban areas where abortion clinics greatly outnumber pregnancy centers. African American and Hispanic women represent only 25% of the population, yet they receive 57% of all abortions. Women deserve more than just one choice.

Ultrasound Legislation

Care Net continues to lobby congress to pass the Informed Choice Act, a bill that will enable pregnancy centers to receive grants for ultrasound machines. Seven out of ten abortion-minded women who see an ultrasound choose life for their unborn children. Last year, Care Net conducted a poll of women and found that 87% of women see ultrasound access as very important.

Multi-Media Campaign

Billboards

In 2003, Care Net placed over 6,000 billboards across the country. Our billboard campaign is in its 8th year of

operation. Thirteen percent of women calling the Option Line do so after seeing a billboard.

TV Commercial

In 2003, Care Net produced a quality 30-second TV commercial and is currently airing it on MTV, Lifetime, E-Entertainment, BET, and Oxygen.

Yellow Pages

The majority of the 35% of women calling the Option Line call center do so after seeing an ad in the Yellow Pages, making it the best performing of all media in which to advertise. In 2003, Care Net will place 30 ads in metro areas across the U.S.

Care Net Publications

Center of Tomorrow Journal

Care Net's new quarterly journal with in-depth research on emerging programs and services for pregnancy centers.

Care Net Report

Care Net's flagship publication, currently in its fifth year of circulation.

Serving With Care and Integrity

Care Net's new volunteer training manual.

Sanctity of Human Life Sunday

Care Net's annual brochure, jointly published with Frontlines.

History of Care Net

Care Net actually began as the Christian Action Council, in 1976. Dr. Harold O. J. Brown founded this organization, with the counsel and encouragement of Rev. Billy Graham and the late Francis A Shaeffer. The first pregnancy center was started in Baltimore in 1980; since then, the number of Care Net pregnancy centers has grown to over 800. Care Net was founded to make up for the consistent failure of political and legal efforts to restore protection to the unborn.

Supreme Court, U.S.
FILED
FEB 3 - 2005
OFFICE OF THE CLERK

No. 04-967

In The

Supreme Court of the United States

NORMA McCORVEY, FORMERLY KNOWN AS JANE ROE,

Petitioner,

v.

BILL HILL, DALLAS COUNTY DISTRICT ATTORNEY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR OIL OF JOY FOR MOURNING, INC., A TEXAS NON-PROFIT CORPORATION, AS AMICUS CURIAE SUPPORTING PETITIONER

DONNA SMITH CUDE
Counsel of Record
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(281) 370-0064

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INTEREST OF AMICUS CURIAE[1]

Oil of Joy for Mourning, Inc., a Texas non-profit corporation (hereinafter "Oil of Joy") is a faith-based abortion recovery group. As part of its ministry, Oil of Joy offers a rehabilitation program for post-abortive women to random segments of the prison population in Texas who have been harmed by abortion. In connection with this recovery program, Oil of Joy sought and obtained data from women in prison who had completed that rehabilitation program. The responses obtained in this study, showing a connection between abortion and dysfunctional behavior, including subsequent crime and incarceration, are important for this Court to consider in making its ruling on the issues raised by Petitioner, McCorvey in the above-entitled case before the Court.

SUMMARY OF ARGUMENT

"Instead of a Right to Choose, abortion has become a woman's Right to Lose."[2]

The United States Supreme Court ruling in *Roe v. Wade,* 410 U.S. 113 (1973), authorizing abortion on demand has had devastating effects on many women who have had such abortions, not to mention catastrophic

[1] Letters of consent to the filing of this brief are submitted to the Court with this brief. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the amicus itself, made a monetary contribution to the preparation or submission of this brief.

[2] Reardon, David C., M.D., *A Path to Hope,* THE POST-ABORTION REVIEW VOL. 7. NO. 2, at 4 (April-June 1999) (quote of Carol Crossed).

consequences to society at large.[3] These untoward consequences of *Roe* are confirmed and demonstrated in the findings of Oil of Joy's survey of women in prison, in which a significant percentage of those responding reported the following problems as a result of their having one or more abortions: depression, suicidal ideation and suicide attempts, alcohol and drug abuse, child abuse and neglect, sexual dysfunction, chronic marriage and intimate relationship problems, and an increased likelihood of turning to crime and subsequent incarceration.[4] The Court should consider these effects, and Oil of Joy requests that the Court take into consideration the social science data it has identified, and grant Plaintiff-Appellant Norma McCorvey's petition for a writ of certiorari.

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[3] Besides the loss of progeny, which dwarfs the recent tsunami deaths by comparison, abortion on demand has contributed to the social problems of suicide, crime and incarceration. *See infra* at ¶ I.A.5. In addition, some assert that without the commonality of abortion during the past three decades, there would be no Social Security crisis as there would be millions more living between the ages of 18 and 31 who would be contributing to the fund.

[4] Those findings are consistent with the results of numerous studies done by researchers reflected in voluminous published works, including David C. Reardon, M.D., *A List of Major Psychological Sequelae of Abortion* (1997) *at* http://www.afterabortion.org [hereinafter *Psychological Sequelae*]; Strahan, Thomas W., *Detrimental Effects of Abortion, An Annotated Bibliography* (3d ed. 2001 & Supp. I 2002 & Supp. II 2003); Philip G. Ney, M.D., *The Effects of Abortion on Health and Demography in North America* (2002) *at* http://www.messengers2.com [hereinafter *Effects of Abortion*].

ARGUMENT

I. THIS COURT SHOULD CONSIDER THE EFFECTS OF ABORTION ON THE HEALTH OF WOMEN AND ON SOCIETY

A. INTRODUCTION

Since the landmark decision in *Roe v. Wade*, the psychological health of a woman throughout her pregnancy has been a consideration of paramount importance to this Court.[5] However, in all its jurisprudence on this subject, the Court has wholly failed to consider the adverse effects to a pregnant woman of permitting unfettered access to abortion. Over the 32-year period since abortion was legalized by this Court, there have been dramatic and devastating effects to women, as well as damaging effects to society. Much evidence has been presented to the Court by Petitioner. In addition, the many harmful effects of abortion on demand have been shown through a recent study of women in prison which Amicus Curiae, Oil of Joy, requests the Court consider.[6]

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[5] *See, e.g., Roe v. Wade,* 410 U.S. 113, 153, 163 (1973) (citing potential adverse psychological consequences of maternity); and *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 846 (1992) (wherein the Court stated that the state has legitimate interests throughout the pregnancy in protecting the health of the woman).

[6] The description and results of the surveys are described in the Affidavit of Rhonda Arias, Director of Oil of Joy, which is appended hereto within the Appendix. Hereinafter, references to the Affidavit will be to "App. __, ¶ __."

B. OIL OF JOY STUDY REVEALS ADVERSE EFFECTS OF ABORTION ON WOMEN IN PRISON

In 2004, Oil of Joy offered a rehabilitation program to a group from the general offender population in three prisons in Texas, the Lane Murray Unit and the Mt. View Unit, both located in Gatesville Texas, and the Plane State Jail, in Dayton. (App. 1, ¶¶ 2, 3). Oil of Joy conducted intake and exit surveys in conjunction with this program. The results of this study are based on surveys of 104 female offenders in Texas prisons who voluntarily completed a 10-week support group for women hurt by abortion (App. 1, ¶ 4). All of the participants reported a range of psychological sequelae from regret to actual suicide attempts. Despite their present state of incarceration, approximately 59 percent stated that they view their lives as before and after their abortion. (App. 1, ¶ 7). In short, abortion was the defining moment of their lives.

1. Abortion was a Precursor to Suicide Attempts and Suicidal Ideation

Due to unresolved grief over the abortion, 69 out of 104, or approximately 66 percent, of the women reported depression following their abortions. (App. 1, ¶ 7). The reasons given for their depression included lowered self-esteem post-abortion, repressed grief due to returning to environments where abortion was considered normal, or having been forced or coerced strongly by a spouse or family member. (App. 1, ¶ 7). In addition, suicidal ideation and actual suicide attempts were relatively common among these post-abortive women. Approximately 32 percent of the women in the study, 33 out of 104, reported having attempted suicide following their abortions, with

38 out of 104, or 37 percent, experiencing repeated thoughts of suicide.

These results are consistent with other studies done regarding the relationship between suicide and abortion. Researchers in Finland found the suicide rate among post-abortive women to be approximately six times higher than women who delivered, and three times higher than that of women in the general population.[7] Likewise, scientists in Britain found a significantly higher suicide attempt rate after induced abortion as compared to the suicide attempt rate before abortion. The researchers stated that their data suggested "a deterioration in mental health may be a consequential side effect of induced abortion."[8]

2. Abortion was a Major Stressor Leading to Drug and Alcohol Abuse

Abortion is significantly linked to offenders' subsequent drug abuse. Female offenders in the Oil of Joy study specifically attributed their drug or alcohol abuse to stress related to the abortion. Most reported that their abortion was either a starting point, or a landmark of increased usage.[9] Specifically, 81 out of 104 reported post-abortion

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[7] *Effects of Abortion, supra* note 4, at ¶ B.1.b. (citing M. Gissler, E. Hemminke and J. Lonnqvist, *Suicides after Pregnancy in Finland, 1987-94: Register Linkage Study,* 313 BRIT. MED. J. 1431-34 (1996)).

[8] C.M. Morgan, M. Evans, J. Peter and C. Currie, *Mental Health May Deteriorate as a Direct Effect of Induced Abortion,* 314 BRIT. MED. J. 902 (1997).

[9] This is consistent with another study in which it was found that post-abortion stress aggravated substance abuse problems among women with a prior history of substance abuse. *See* Reardon, David C., *New Study Confirms Link between Abortion and Substance Abuse,* THE POST-ABORTION REVIEW VOL. 1. NO. 3, at 2 (Fall 1993).

drug abuse, and 74 out of 104 reported post-abortion alcohol abuse. Only 14 percent said they had no substance abuse post-abortion. Lowered self-esteem, the pain of a loss that no one seems to understand, nowhere in society to grieve, feelings of guilt and shame, and anger toward themselves and others, are some of the reasons women gave for "medicating" their pain through drug or alcohol abuse. (App. 1, ¶ 8). These findings are similar to those results reached in a separate study done by the Elliot Institute researchers, who found that of the women surveyed, those who aborted their first pregnancy were 3.9 times more likely to engage in subsequent drug or alcohol abuse than those who have never had an abortion.[10]

In the 1980's, in each of three separate studies done by different researchers on post-abortive women, virtually all of the participants expressed feelings of deep anger, resentment and hostility toward themselves, their partner and the medical professionals involved. The hostility was identified as being the result of feeling coerced by boyfriends, parents or physicians and feeling that they did not have a choice.[11] It is well-known that the presence of hostility, combined with alcohol or drug abuse, reduces inhibitions or self-control and increases the tendency toward violence and other antisocial behavior, which may ultimately lead to incarceration.[12] Thus, induced abortion

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[10] *Id.* at p. 1.

[11] Strahan, Thomas W., *The Incidence and Effects of Alcohol and Drug Abuse in Women Following Induced Abortion*, LIFEISSUES.NET: CLEAR THINKING ABOUT CRUCIAL ISSUES VOL. 3, NO. 2 (A.I.R.V.S.C. 1990).

[12] In another study, induced abortion followed by alcohol abuse was linked to being charged with driving while intoxicated, automobile accidents, divorce or separation, and job loss. Morrissey, E.R. and Schuckit, M.A, *Stressful Life Events and Alcohol Problems among*

(Continued on following page)

may be implicated in the steady increase of the female prison population in the United States.[13]

It is also likely that the risk of post-abortion substance abuse among women who undergo multiple abortions is even higher than the risk for women who experience only a single abortion. Indeed, 45 percent of the incarcerated women surveyed by Oil of Joy experienced multiple abortions. (App. 1, ¶ 8).

3. A Substantial Percentage of Post-Abortive Women Had Parenting Problems with Children Born Subsequently

The Oil of Joy studies showed that 45.2% of the women saw a connection between their abortion and their inability to bond with their subsequent children. (App. 1, ¶ 9). Abortion is linked with increased depression, violent behavior, alcohol and drug abuse, replacement pregnancies, and reduced maternal bonding with children born subsequently.[14] These factors are closely associated with child abuse and would appear to confirm individual clinical assessments linking post-abortion trauma with

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Women Seen at a Detoxification Center, J. STUDIES ON ALCOHOL VOL. 39, NO. 9, at 1559 (1978).

[13] *Ibid; See also* U.S. Department of Justice, Bureau of Justice Statistics, Table 6.22 at http://www.albany.edu/sourcebook/pdf/1622/pdf (showing steady increase in female offender population in U.S. prisons).

[14] Reardon, David C., M.D., *The Aftereffects of Abortion* (Elliot Inst. 1990).

subsequent child abuse.[15] Of the 104 participants in the Oil of Joy study, 61 percent expressed anxiety in their parenting due to fears that something bad would happen to their present children. They felt that they had to over-protect their children, and be careful to do everything right. They were motivated by their past decision to "wait to become a mother", and felt a need to prove that they had become a perfect mother. If they felt this was not reflected in their children's behavior, the children were punished severely. (App. 1, ¶ 9).

Canadian psychiatrist Philip Ney reports the same findings. He writes,

> When I investigated the relationship between child abuse and abortion and reported a direct correlation, people were angry and astonished. It appeared that the rate of child abuse did not decrease with freely available abortions. In fact, the opposite was true. In parts of Canada where there were low rates of abortion there were low rates of child abuse. As the rates of abortion increased, so did child abuse . . . Indeed, it is a vicious cycle. That is, parents who have been involved in abortion are more likely to abuse and neglect their children. Mothers and fathers who were abused as children are more likely to abort their child.

Ney, Philip G., M.D., *Deeply Damaged* 91 (3d ed., Pioneer Publishing: Victoria, Canada 1997).

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[15] Philip G. Ney, M.D., *Relationship between Abortion and Child Abuse,* 24 CANADIAN J. OF PSYCHIATRY 610-620 (1979).

4. Having An Abortion Was Associated With Sexual Dysfunction and Chronic Marriage and Intimate Relationship Problems

Approximately 53 percent of the incarcerated post-abortive women, 66 out of 104, reported post-abortion disruptions in their personal relationships. (App. 1, ¶ 11). These problems included an aversion to sex and/or males in general, and/or the development of a promiscuous life-style. Issues of distrust and fear of pregnancy contributed to frigidity and homosexuality, while lowered self-esteem and a desire to replace the aborted baby contributed to promiscuous lifestyles. (App. 1, ¶ 10).

As demonstrated by past studies, for most couples, an abortion causes unforeseen problems in their relationship.[16] Post-abortion couples are more likely to divorce or separate. Many post-abortion women develop a greater difficulty forming lasting bonds with a male partner.[17] This difficulty may be due to abortion-related reactions such as lowered self-esteem, greater distrust of males, sexual dysfunction, substance abuse, and increased levels of depression, anxiety, and volatile anger. In 1998 the Justice Department reported that women were the perpetrators of almost one third of domestic violent crimes.[18] Freely available abortion and its injurious effects on male/female relationships may be responsible for some of these crimes.

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[16] *Psychological Sequelae*, *supra* note 4, at 4 n.21 (citing studies).

[17] *Id.*

[18] Hubin, Donald C., "Intimate Partner Violence," Dept. of Philosophy, Ohio State Univ. (1998) (Report to United States Department of Justice).

5. Many Women Associated their Abortion with Subsequent Crime and Incarceration

The number of women under the jurisdiction of State or Federal prison authorities is increasing more rapidly than that of men.[19] The rate of female incarceration has steadily inclined since legalized abortion in 1973.[20] In a separate survey done by Oil of Joy of 27 post-abortive female offenders, approximately 63 percent said that they felt that abortion had either a lot to do with their incarceration or had an indirect effect on their crime and subsequent incarceration.[21] In addition, Oil of Joy consistently finds that whenever support after abortion to segments of the prison population is offered, over half of the women respond, expressing their need for recovery after abortion. (App. 1, ¶¶ 12, 13). It is clear that abortion has had a significant adverse effect upon these women, causing dysfunctional and destructive behavior and ultimately, in many cases, leading to crime and incarceration, which this Court should consider in ruling on Norma McCorvey's petition for a writ of certiorari.

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[19] U.S. Department of Justice, Bureau of Justice Statistics reveal that the number of women under the jurisdiction of State or Federal prison authorities increased 4.9 percent during 2002, while the number of men rose just 2.4 percent. Bureau of Justice Statistics, U.S. Dept. of Justice, *Prisoners in 2002* 4 (July 2003 & March 2004).

[20] U.S. Department of Justice, Bureau of Justice Statistics, Table 6.22 at http://www.albany.edu/sourcebook/pdf/1622/pdf.

[21] Oil of Joy program exit survey, Lane Murray Unit, November 2004, 27 mothers surveyed, representing 90 abortions.

II. THE FACTUAL AND MORAL ASSUMPTIONS UNDERLYING *ROE* ARE NOT VALID

A. INVALIDITY OF FACTUAL ASSUMPTIONS

As shown by the Oil of Joy surveys and prior documented studies, induced abortion has been more harmful to women than had they made the decision not to have an abortion. The assumptions that constituted the justification for *Roe* included: 1) a "distressful life and future" by reason of maternity; 2) the alleged "distress . . . associated with the unwanted child"; and 3) being purportedly "unable, psychologically and otherwise, to care for [the child]." 410 U.S. at 153. The *Roe* Court essentially promoted abortion as therapeutic to cure or prevent those purported ills.

In later decisions, the Court, in reaffirming *Roe*, expanded the notion of the choice to abort as being justified not only for therapeutic reasons, but as a right that belongs to the woman for reasons of convenience. As Justice Blackmun laid out in his concurring opinion in *Casey*, the right of abortion must continue undisturbed because "motherhood has a dramatic impact on a woman's educational prospects, employment opportunities and self determination. . . . " 505 U.S. at 928.

These justifications are not sound, particularly in present-day society. The Pregnancy Discrimination Act of 1978,[22] 42 U.S.C. § 2000e, *et seq.*, and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq.*, have

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[22] Discrimination is prohibited on the basis of sex, including "pregnancy, childbirth or related medical conditions." 42 U.S.C. § 2000e(k).

eliminated many of the concerns related to pregnancy and childbirth and the associated impact on economic and employment opportunities. Unwed motherhood is no longer a stigma, and in most instances, it does not prevent a woman from being physically active or from attending school. The pain associated with labor and delivery has been significantly lessened by the widespread use of the Lamaze method, anesthetic epidurals and other pain-relieving methods and medicines. Open adoption, Baby Moses laws, the prevalence of pregnancy crisis centers, continued extended family support, together with church, school and community child-bearing and parenting classes and support groups, not to mention the plethora of resources available in bookstores, libraries and on the internet, have eased the anxieties that may have previously existed for pregnant mothers.

B. INVALIDITY OF MORAL ASSUMPTIONS

An insidious effect of *Roe,* from which many post-abortive women in prison and other post-abortive women are now suffering, was that the ruling, for the first time, placed abortion and maternity on a co-equal moral plane. The same value was ascribed to aborting the child as the choice to deliver a child. This philosophy, manufactured by the Court, infiltrated the culture. As a result, many unsuspecting women bought into the concept that they must end their pregnancies for the sake of their boyfriend, their parents, their husband or their career, and it is these same women who have had to bear the enormous and crippling guilt of having murdered their own children. For some, it has been manifested through anti-social and criminal behavior, destructive not only to the women themselves, but to society as a whole.

Given the fact that pregnancy is a natural and normal experience which is increasingly supported by our culture, and due to the mounting evidence of the destructiveness to women, and ultimately to society, of abortion on demand, this Court should reconsider the social policy it engineered in *Roe*.

CONCLUSION

For all of the reasons set forth above, amicus request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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(281) 370-0064

FEBRUARY 2005

No. 04-967

IN THE UNITED STATES SUPREME COURT

Norma McCorvey, formerly known as Jane Roe, Petitioner

v.

Bill Hill, Dallas County District Attorney, Respondent

AFFIDAVIT OF RHONDA ARIAS IN SUPPORT OF *AMICUS CURIAE* BRIEF OF OIL OF JOY FOR MOURNING IN SUPPORT OF PETITIONER NORMA McCORVEY, FORMERLY KNOWN AS JANE ROE

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned authority, on this day personally appeared Rhonda Arias, who upon oath stated as follows:

1. My name is Rhonda Arias. I am over the age of twenty-one and have never been convicted of a felony or a crime of moral turpitude. I am of sound mind and I am fully competent to make this Affidavit. I have personal knowledge of the matters contained in this Affidavit and the matters contained herein are true and correct.

2. I am a post-abortive woman and a minister in charge of a non-profit faith-based organization known as Oil

of Joy for Mourning (hereinafter referred to as "Oil of Joy"). As part of its ministry, Oil of Joy offers a rehabilitation program for post-abortive women who have been harmed by abortion.

3. In connection with this program, Oil of Joy obtained data from women in prison who had completed Oil of Joy's rehabilitation program. Specifically, Oil of Joy offered a rehabilitation program in 2004 to a general offender population in each of three prisons located in Texas, the Lane Murray Unit located at 1916 North Highway 36 Bypass, Gatesville, Texas (hereinafter "Lane Murray"), the Mt. View Unit located at 2305 Ransom Road, also in Gatesville, Texas (hereinafter "Mt. View"), and the Plane State Jail, located on Route 3 in Dayton, Texas (hereinafter "Plane State").

4. Oil of Joy conducted intake and exit surveys in conjunction with this program. The results of the study are based on surveys of 104 female offenders in Texas prisons who voluntarily completed a ten-week support group program for women hurt by abortion.

5. As shown more specifically below, the data obtained from the women who participated in the program demonstrate numerous adverse consequences of abortion, including depression, increased risk of suicide, alcohol and drug abuse, child abuse and neglect, sexual dysfunction, chronic marriage and intimate relationship problems, and an increased likelihood of turning to crime and subsequent incarceration.

6. Fully 74 percent of those surveyed at the beginning of the program said they regretted their abortion. All reported a range of psychological sequelae ranging from

regret to suicidal ideation. Despite their present state of incarceration, approximately 59 percent compartmentalize their lives as before and after their *abortion*. Their abortion was the defining moment in their lives.

7. Approximately 66 percent reported depression following their abortions. The reasons given for such depression included lowered self-esteem post abortion, repressed grief due to having to return to environments where abortion was considered normal, or having been forced or coerced strongly by a spouse or family member to have an abortion. In addition, suicidal ideation and actual suicide attempts were relatively common among these post-abortive women. Approximately 32 percent of the women in our programs reported having attempted suicide following their abortions, with another 37 percent experiencing repeated thoughts of suicide. A true and correct copy of the graph showing these results is as follows:

	Depression	%	Suicidal ideation	%	Suicide attempts	%
Plane State	31/46	67.3	10/46	21.7	10/46	21.7
Mt. View	15/16	93.7	6/16	37.5	5/16	31.2
Lane Murray	23/42	54.8	22/42	52.4	18/42	42.8
	69/104	66.3	38/104	36.5	33/104	31.7

8. Abortion is significantly linked to offenders' subsequent drug and alcohol abuse. Female offenders surveyed by Oil of Joy specifically attributed their drug or alcohol abuse to stress related to their abortion. Most reported that their abortion was either a starting point, or the point at which

she increased her usage of drugs and alcohol. Only 14 percent reported that they had no substance abuse post-abortion. The reasons given for such usage or increased usage of drugs or alcohol post-abortion were lowered self-esteem, the pain of a loss that no one seems to understand, the lack of any forum in society within which to grieve, feelings of guilt and shame, and anger toward themselves and others. Forty-five percent of the women surveyed experienced multiple abortions. A true and correct copy of the graph displaying the foregoing findings is as follows:

	Drugs	%	Alcohol	% Alcohol	% Substance abuse
Plane State	39/46	84.7	34/46	73.9	89.1
Mt. View	9/16	56.3	8/16	50.0	62.5
Lane Murray	33/42	78.6	32/42	76.2	85.7
	81/104	77.9	74/104	71.2	83.7

9. The Oil of Joy studies showed that 45.2 percent of the women saw a connection between their abortion and their inability to bond with their subsequent children. Sixty-one percent expressed anxiety in their parenting due to fears that something bad would happen to their present children. They felt they had to overprotect their children and be careful to do everything right. They were motivated by their past decision to wait to become a mother, and felt a need to prove that they had become a perfect mother. If they felt this was not reflected in their child's behavior, the child was

punished severely. A true and correct copy of the graph pertaining to the detachment from born children is as follows:

	Detachment	%
Plane State	22/46	47.8
Mt. View	5/16	31.3
Lane Murray	20/42	47.6
Totals	47/104	45.2

10. Approximately 53 percent of the incarcerated post-abortive women reported experiencing sexual dysfunction, of both short and long duration, beginning immediately after their abortions. These problems included an aversion to sex and/or males in general, and the development of a promiscuous lifestyle. Issues of distrust and fear of pregnancy contributed to frigidity and homosexuality, while lowered self-esteem and a desire to replace the aborted baby contributed to promiscuous lifestyles. A true and correct copy of the graph depicting the responses pertaining to sexual dysfunction and abortion is as follows:

	Frigidity	Promiscuity	Homosexuality	General
Plane State	9/46	14/46	10/46	18/46
Mt. View	6/16	3/16	3/16	8/16
Lane Murray	17/42	20/42	18/42	29/42
Totals	30.7%	35.6 %	29.8%	52.8%

11. In terms of disruption to personal relationships, the following chart shows the results from the prison survey:

	Disruption of personal relationships	%
Plane State	22/46	47.8
Mt. View	13/16	81.3
Lane Murray	31/42	73.8
TOTALS	66/104	63.5

12. Oil of Joy conducted a study in November 2004, consisting of an exit survey of 27 post-abortive women in the Texas Lane Murray Unit. Of these 27 mothers surveyed, approximately 63% of post-abortive female offenders said that they felt that abortion had either a lot to do with their incarceration or an indirect effect on their crime and subsequent incarcerations.

13. Oil of Joy consistently finds that whenever support after abortion to random segments of the prison population is offered, over half of the women respond, expressing their need for recovery after abortion.

14. Given the foregoing plethora of social science data concerning the adverse effects of abortion on the psychological health of women and the mounting evidence associating abortion with criminal behavior, it is clear that the availability of abortion on demand is harmful to women's health in a myriad of ways, as well as society in general.

Further Affiant saith naught.

/s/ Rhonda Arias
Rhonda Arias

SUBSCRIBED AND SWORN TO BEFORE ME by the said Rhonda Arias this 25th day of January, 2005.

/s/ Liliana E. Deagustini
Notary Public in and for
The State of Texas

My commission expires:
12-14-2005

(17)

CASE # 04-967

In The Supreme Court Of The United States

NORMA MCCORVEY,
FORMERLY KNOWN AS JANE DOE

PETITIONER

Vs.

WILLIAM "BILL" HILL,
DALLAS COUNTY DISTRICT ATTORNEY

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR FIFTH CIRCUIT

BRIEF OF MARGIE REILEY AND LAURETTE ELSBERRY AS AMICII CURIÆ IN SUPPORT PETITIONER WITH APPENDIX

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STATEMENT OF INTEREST[1]

Amicii are individual activists seeking an end to abortion as it impinges on a member of Sovereignty, Posterity. They share the views of counsel who has taken an oath to uphold and defend the Constitution of the United States and to defend the poor, downtrodden, and oppressed.

Margie Reilly graduated from St. John's University, Jamaica, New York with a *summa cum laude degree* in Management. Number two in her class, Beta Gamma Sigma Business Honor Society. She is the granddaughter of a former United States Congressman John Rainey of Illinois, deceased. Most of her career has been with the Federal Government: Defense Logistics Agency, NYC, NY and McClellan AFB, N Highlands, CA as well as Social Security Administration where she retired early as a service representative. She is now employed as a substitute schoolteacher with San Juan Unified School District and Sacramento City School District where she takes K-12 assignments on a part time basis and specializes in preschool and Head Start early childhood programs. She has been actively involved in the prolife movement for many years as a sidewalk counselor, member of her Diocesan prolife committee and supports many prolife causes including Priests for Life, American Life League, Prolife Action League of Chicago, National Right to Life, Bishop Gallegos Maternity Home, SOHLNET, Couple to Couple League, Loaves and Fishes, and Sacramento Food Bank and other worthy charities. She participated in the Washington, D.C. March for Life in 2001. Most recently, she testified before the Sacramento County

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[1] Lead Counsel for *Amicii Curiae* authored this brief in its entirety in collaboration with the Pacific Justice Institute. No person or entity, other than the Pacific Justice Institute and the named *Amicii curiae*, associates, supporters, or counsel, made a monetary contribution to the preparation or submission of this brief.

Board of Supervisors against a "no protest bubble zone" that was enacted specifically to stifle the free speech rights of prolife activists at abortion clinics and medical facilities in the County.

Laurette Elsberry has been employed over 40 years by the State of California, the most recent 20 years as a criminal analyst, has been victimized for her prolife activities and participated in the editing a number of briefs on the abortion issue. She has been active in many educational projects involving abortion and has participated in vigils for the unborn. She has also given testimony at the State Supreme Court regarding the qualifications of State Court Justices.

Lead Counsel is an affiliate of the Pacific Justice Foundation and has presented similar *Amicii Curiae* Briefs in this court.[2] He is a former professor of Law, University of Northern California, Lorenzo Patiño School of Law. He is affiliated with pro-life groups, has concentrated his practice in the areas of Civil Rights, Human Rights, Constitutional Law, Criminal Defense, and authored two articles on Abortion: Lynch, ABORTION AND INALIENABLE RIGHTS IN AMERICAN JURISPRUDENCE; A PROSPECTIVE POLICY (© 1987), http://users.cwnet.com/jjlynch/ProlifePages/ABORTION.DOC (Hereinafter, LYNCH I); Lynch, *Posterity: A constitutional Peg for the Unborn*, 45 AJJ 401 (Notre Dame Law School. 1995) (Hereinafter, LYNCH II); He

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[2] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (For Appellant); *Ohio v. Akron Reproductive Center*, 497 U.S. 502 (1990) (For Appellant); *Hodgson v. Minnesota v. Hodgson*, 497 U.S. 417 (1990) (For Minnesota; *2* Briefs); *Bray v. Alexandria*, 506 U.S. 263 (1993) (For Petitioner). Counsel has also presented an *Amicii* brief in other unrelated cases. *Walters* v, *NARS*, 473 U.S. 305 (1925) *(amicus Curiae* Andrew Groza for respondent); *Dickerson v. USA* (*Amicus Curiæ* Rutherford Institute for Petitioner), 530 U.S. 428 (Rutherford Institute for petitioner). While not filed, *Turnock v. Ragsdale*, 503 U.S. 916 (1992) was dismissed after a tentative opening brief was submitted to ACLU for review prior to filing. (For Appellant)

lived four years in England where he engaged in a self-directed study of the English Political System from the inception of the *Magna Carta* (1215). He is a graduate of McGeorge School of Law (1978).

Pacific Justice Institute is a non-profit 501(c)(3) legal defense organization specializing in the defense of religious freedom, parental rights, protection of life, and other civil liberties. The Institute works diligently, without charge, to provide clients with legal support and assistance in each of those areas of the law in order to secure the rights and freedoms inherent to all Americans.

This case touches and concerns the continuing validity *of Roe v. Wade,* 410 U.S. 113 (1973) and its *progeny*, and, as such, a decision herein will affect not only the laws of the State of California, but all of its sister states and territories of the United States.[3] This Court's *Amicii* is concerned about the inclusion of "unborn and partially born children" (hereinafter, "unborn children") as present members of "Posterity" in the Preamble of the Constitution, and is concerned, and has been concerned for some time, that unborn children have been unrepresented or under-represented in court in the years of litigation that have followed Roe in 1973. Counsel was convinced then, and *Amicii* is convinced now, that the Court was misled as to the meaning of "personhood." It is *amicii curiae's* belief that "unborn children" are present members of "Posterity" in the Preamble of the Constitution, and it is imperative, for the preservation of a basic respect for human life and the values enshrined in the Constitution of the United States, that these children be recognized as present members of "Posterity" entitled to protection.

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[3] Cases are pending appeal regarding the same, or similar issues. See, *Planned Parenthood v. Ashcroft, 9th Cir. # 04-16621; Carhart et al v. Ashcroft,* 8th Cir., # 04-3379; *National Abortion Federation, et al v. Ashcroft,* 2nd Cir., 04-5201.

SUMMARY OF REASONS FOR GRANTING CERTIORARI

1. Unconstitutional conduct cannot be justified by widespread and long use. With respect to the Constitution, *stare decisis* is of less importance than in other areas, and therefore, the holding of *Roe v. Wade* and its *progeny* is not necessarily binding on this Court.

2. Since *Roe v. Wade* was decided, Congress, with plenary control over citizenship, appears to have extended the protection of citizenship to the "unborn children" as arguably following under the penumbra of "posterity," which should be accorded the respect due a coordinate branch of government, representing a changed circumstance justifying review.

3. There has been a change in the perception of whom this Court has recognized as entitled to protection, to wit aliens and artificial persons, suggesting an anomaly not to find "unborn children" as entitled to protection. There is also an increasing change in recognizing that while the Preamble does not create rights, it does define for whom the rights were created, which would include the "unborn children" as members of "Posterity," which this Honorable court needs to address, as that understanding appears to be consistent with the intent of the framers, and a common law understanding, that "unborn children" were persons in being, therefore protected by the Constitution.

4. Based upon the foregoing, this court should grant certiorari to resolve whether *Roe v. Wade*, 410 U.S. 113 (1973) and its *progeny* are in fact viable in the face of a growing body of literature that suggests that the court erred.

REASONS FOR GRANTING CERTIORARI

I.

STARE DECISIS IS LESS BINDING IN CONSTITUTIONAL ISSUES DESPITE LONG STANDING AND WIDESPREAD PRACTICE; ROE AND ITS PROGENY DID NOT CONSIDER THE TERM "POSTERITY" IN THE PREAMBLE OF THE CONSTITUTION

Statutes or practices inconsistent with the Constitution, however pervasive, cannot create a power that the Constitution does not bestow, nor furnish a construction that the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649 (1891); 3 Rotunda, TREATISE ON CONSTITUTIONAL LAW § 23.33, p. 512 (1986). This Honorable Court has invalidated in part its own Rules of Court, which were in part based on a Congressional Statute requiring attorneys to take an oath with respect to their activities before the end of the Civil War, when it was pointed out that the provision was in fact unconstitutional. *Ex Parte* Garland, 71 U.S. (4 Wall.) 333 (1867). Faced with the constitutionality of "separate but equal" facilities, a practice in existence throughout the south, and sanctioned by this Honorable Court for 58 years, this Court nonetheless correctly *overruled Plessy* v. *Ferguson*, 163 U.S. 537 (1896) in *Brown v. Board of Education*, 347 U.S. 483 (1954) (Brown 1). *Accord, Bolling v. Sharpe*, 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues that need to be resolved, this Court has not allowed the fact that some issues were not properly addressed in the courts below to prevent further argument on the issues omitted so that the continuing controversy could be settled. Brown I, 347 U.S., at 489, 496; *Brown v. Board of Education.*, 349 U.S. 294, 298 (1955) (*Brown II*) (for remedy).

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The [*Planned Parenthood v.*] *Casey*[, 505 U.S. 833 (1992)] court noted that Roe[4] stood at the intersection of two lines of decisions. One, typified by *Griswold v. Connecticut*, 381 U.S. 479 (1965), are those cases which found a right to privacy in which the state had no right to interfere with personal choices regarding sex,[5] family, and whether to bear and beget children. Casey, 505 U.S., at 857. The other line of cases found there exists a certain individual autonomy that limited governmental power regarding medication and the right to die, which supports the *Roe* conclusion. *Ibid.* The *Casey* plurality suggests that *Roe* might be *sui generis*, i.e., one of a kind, but since there had been no erosion of its central premise, noting the change in membership and squabbling among the justices, even if the court were to assume error by Roe, "it only went

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4 Interestingly, the Roe citations in support of a woman's right to privacy simply do not support an absolute right to privacy. Indeed, in what appears now to be a false first step, the High Court observed the right to privacy was first noted in 1891, citing a case that had nothing to do with a constitutional issue. *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891); *but cf, Sibbach v. Wilson & Co.*, 312 U.S. 1, 11 (1940). *Sibbach* teaches that *Botsford* was not a substantive rule of constitutional law of privacy, but rather, one of statutory construction. In 1891, there was no authority for a physical examination of a plaintiff, a legislative omission cured by the Federal Rules of Civil Procedure, Rule 35, which was no affront to privacy because the plaintiff voluntarily advanced the issue by bringing suit.

5 The court has not been consistent with respect to sex. For instance, in *Bennis v. Michigan*, 516 U. S. 442 (1996), where a man engaged in sexual intercourse with a prostitute in the family vehicle, was caught, the vehicle was subject to forfeiture, and the wife of the man could not redeem her community property interest, notwithstanding she had no knowledge of the act. No case has held that a woman, based on her right to privacy, can do whatever she wishes with her body. Acts of prostitution, even in the privacy of her own bedroom, may be in violation of state law and said law is still constitutional. *A fortiori*, if "unborn children" are persons in the constitutional sense, it is not possible that a woman has an absolute right to take the child's life.

to the strength of the state interest in fetal protection, not to the recognition by the Constitution of the woman's liberty." *Casey*, 505 U.S., at 858-59. The soundness of Roe, said the *Casey* Court, was apparent from a consideration of the alternative. "If indeed, the woman's interest in deciding whether to bear and beget a child had not been recognized in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example." *Casey*, 505 U.S., at 860. After a review of *stare decisis*,[6] the lack of anything new regarding the status of unborn children, and in view of widespread reliance, *Casey* abandoned *Roe's* trimester periods, and affirmed both women's rights and the "State's interest in protecting human potentiality" after viability, provided there was no undue burden on a woman's choice. *Ibid.*

Casey begs important questions. The central issue is not whether a woman has a right to decide whether to beget children; of course she does. And of course there is no issue as to termination of a pregnancy; all pregnancies will terminate at the end of term, by natural birth, caesarian section, or otherwise. The issue *is*: whether a woman has the right to choose to terminate the life of "unborn children" once begot where the life and health of the mother is not at risk. The *Roe* Court reached the result it did because, it said, Texas had failed to demonstrate where in the Constitution "unborn children" were Constitutional persons. 410 U.S., at 157-59.[7] *Casey* perpetuates the

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[6] Justice O'Connor conceded there was an erosion of support by the justices as to the continued validity of Roe.

[7] A reading of the Petition, Response, and Briefs by the parties and *Amicii in Roe* shows the primary focus was on the term person as found in the 5th and 14th Amendments. 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES.

Roe error on the basis there has been no development in constitutional theory that undermines the *Roe* premise. Neither opinion addresses the term "Posterity"[8] in the Preamble, nor its meaning. Furthermore, there has been a growing recognition that this Honorable Court erred. COMMENTS, TO BE AND NOT TO BE: INCONSISTENCIES IN *THE LAW* REGARDING THE LEGAL STATUS OF THE UNBORN FETUS, 71 Temple Law Review 963, 994 (1998) (hereinafter, To Be and Not to Be.); Notes, Fourteenth Amendment Personhood; Fact or Fiction?, 73 St. John's Law Review 495, 530-40 (1999) (hereinafter, *Fourteenth Amendment* Personhood); LYNCH I, *supra*; LYNCH II, *supra*.[9]

This court can judicially notice the impact on the judiciary by abortion cases, and that this Court's opinions have been heavily criticized as being unsound in principle and unworkable in practice. *To Be and Not to Be;* Fourteenth Amendment Personhood, supra ("our judiciary is dishonest in its treatment of fetuses"); Lynch I and II, *supra*. Similarly, it is well known that the abortion controversy has led to disorder in the streets throughout the country.[10] Moreover, beginning with *Webster v. Reproductive Health Services*, 492 U.S. 490, 518-519 (1989) (Rehnquist, Ch. J.), this Court has increasingly found "*Roe* to be unsound in principle and unworkable in practice." The most critical voice of this court's position came from this Honorable Court's Justice Scalia in dissent in

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[8] Douglas, J., mentioned "liberty," but that was hardly an exposition on the meaning of "Posterity" in the Preamble.

[9] Notwithstanding widespread availability in print, and on the web, no article has ever purported to demonstrate the unsoundness of the approach taken in either Lynch I or Lynch II.

[10] It is not suggested that disorder is a reason for overruling *Roe*. The reason is "unborn children" are persons who are present members of "Posterity" in the Preamble of the Constitution.

Stenberg v. Carhart, 530 U.S. 914, 953 (2000).[11] In fact, a proper reading of the Preamble *in pari materia* with the body of the Constitution shows that:

A person is created at conception. Preamble.
A person becomes a citizen at birth. 14th Amend, § 1.
A person can vote at age 18. 26th Amend, § 1.

Congress has not been silent. In 2002, it adopted definitions for "person," "human being," "child," and "individual" as including "born-alive infants." 1 U.S.C., § 8.[12] The adoption of the section goes beyond the definition to recognize and preserve the common

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[11] "The notion that the Constitution of the United States, designed, among other things, "to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity," prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd."

[12] Sec. 8. "Person", "human being", "child", and "individual" as including born-alive infant

"(a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person", "human being", "child", and "individual", shall include every infant member of the species homo sapiens who is born alive at any stage of development.

"(b) As used in this section, the term "born alive", with respect to a member of the species homo sapiens, means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

"(c) Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being "born alive" as defined in this section." Added Pub. L. 107-207, Sec. 2(a), Aug. 5, 2002, 116 Stat. 926.)

law rights[13] of "any member of the species homo sapiens at any point prior to being "born-alive"" as defined within that section. Id, subsection (c). The Congress has also adopted Partial Birth Abortion Act. 18 U.S.C., § 1351, Public Law 108-105 (2003), Appendix, page C1ff.

Thus, this Court should grant review to reexamine *Roe*, and recognize, in light of the above, that this Court has retreated from *Roe v. Wade*, 410 U.S. 113 (1973), and in light of the arguments to follow, should *overrule Roe, vacate the judgment*, and remand for further proceedings in light of the fact that "unborn children" are present members of "Posterity," as used in the Preamble, thus persons entitled to protection.

II.

SINCE ROE V. WADE, CONGRESS, WITH PLENARY CONTROL OVER NATURALIZATION, HAS APPARENTLY EXTENDED CITIZENSHIP STATUS TO THE "UNBORN CHILDREN", WHICH THIS COURT SHOULD ACCORD DEFERENTIAL RESPECT

The U.S. Supreme Court has supervisory authority over the federal courts to prescribe binding rules of evidence and procedure. *Carlisle v. United States*, 517 U.S. 416, 426 (1996).[14] While Congress has ultimate authority to modify or set aside any such rules that are not constitutionally required, *e.g., Palermo v. United States*, 360 U.S. 343, 345-348 (1959), it may not supersede this Court's decisions interpreting and

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[13] 1 Blackstone, Commentaries on the Law of England, p. 126; Appendix B1 – B2: "An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. ...." Id, p. 126. Appendix, p. B1.

[14] Once a federal claim [or defense] is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. B*ankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899).

applying the Constitution. *See generally, City of Boerne v. Flores*, 521 U.S. 507, 517-521, *Dickerson v. U.S.*, 530 U.S. 428 (2000).

This case comes to the courts in a materially different posture than Dickerson. There, Congress attempted to overrule the Miranda decision and redefine a defendant's rights under the 5th Amendment in a manner inconsistent with an opinion of this Court.

In this case, Congress has, by its authority under Article I, § 8, clause 4, extended protection to a class of persons apparently recognized as members of Posterity, in the absence of any opinion from this Court defining the term Posterity as used in the Preamble.

It is conceded that that both Art. I, § 8, clause 18, and the 14th Amendment, § 5, are "a positive grant of legislative power" to Congress to "enact necessary and proper legislation to carry out that objective." *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966); *Wayman v. Southhard*, 23 U.S. (10 Wheat.) 1 (1825). In *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880) and *Boerne v. P.F. Flores*, 594 U.S. 511, 517 (1997), this Court explained the scope of Congress' § 5 power in the following broad terms:[15]

> "Whatever legislation is appropriate ... to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws ... denial or invasion, if not prohibited, is ... within the domain of congressional power."

Congress has plenary power over naturalization. Art. I, § 8, clause 4. Naturalization has been defined as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen." *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 15, 162 (1989). Given the powers granted under Art. I, § 8, clause 18 and § 5

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[15] It is also true that "[a]s broad as the congressional enforcement power is, it is not unlimited." *Oregon* v. *Mitchell, supra,* at 128 (opinion of Black, J.); E.g., *Boerne v. P.F. Flores*, [594] U.S. 511, 518 (1997) (Opinion by Kennedy, J.).

of the 14th Amendment, and the words in the Preamble, "to secure the blessing of liberty to ourselves and our Posterity" it would appear, *see infra*, that Congress could "adopt [Posterity, the conceived unborn,] and cloth[e them] with the privileges of a ... citizen," until they are born.

Thus, there is squarely presented a tension between this Court's decision in *Roe v. Wade*, and its progeny, regarding the rights of Women under the 14th Amendment (*See, e.g., Planned Parenthood v.* Casey, 505 U.S. 833 (1992)), and new law and the Congressional power under Clause 4 to regulate naturalization by "adopt[ing Posterity, the conceived unborn,] and cloth[ing them] with the privileges of a ... citizen," until they are born, an issue arising under the Preamble, to which this Court has never spoke, and an increasing recognition that the Court overlooked the true meaning of "Posterity" in the Preamble.

Given the right of Congress to "secure the blessings of liberty for ourselves and our Posterity", and Clause 4 power to regulate naturalization, this court should grant review to determine whether deference should be given to the Congressional authority to abolish what it considers contrary to the principles found in the Constitution for the protection of human life, and whether "unborn children" are members of "Posterity," and whether the decision in *Roe v. Wade* ought be vacated in light of the foregoing.

III.

IT IS BECOMING INCREASINGLY CLEAR THAT THE "UNBORN CHILDREN" ARE PRESENT MEMBERS OF "POSTERITY"

Neither the 5th Amendment nor the 14th Amendment defines personhood. The 14th Amendment only

defines citizenship.[16] In other contexts, the court has held that aliens,[17] and artificial persons[18] are persons entitled to Constitutional protection.[19] Not to recognize the "unborn children" as persons is therefore an anomaly.[20] As "Person," is used without qualification, the most logical place to look for meaning is the Preamble,[21] because while its purpose is not to create

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[16] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof ..."

[17] *E.g., Hampton v. Mow Sun Wang*, 426 U.S. 88 (1976); Const., Art. VI, Treaty Clause; McKechnie, *Magna Carta*, Art. 41 (Aliens).

[18] *See, Chicago B. & Q. R.R. Co. v. Iowa*, 94 U.S. 155 (1877); *E.g., Land v. Dollar*, 330 U.S. 731 (1974) (*Replevin*; Stock taken under color of federal law).

[19] In virtually every context outside the abortion debate, the unborn are recognized as a person. *See*, Strahan, *Legal Protection of the Unborn Child Outside the Context of Induced Abortion*, 11 Association for Interdisciplinary Research in Values and Social Change (March/April 1997); *Civil Rights – Fetus as a Person*, 64 ALR Fed 886; Wasserstorm, *Homicide Based on Killing of Unborn Child*, 64 ALR5th 671; Wakefield, *Unborn Child as Insured or Injured Person Within Meaning of Insurance Policy*, 15 ALR4th 548.

[20] At common law, the unborn were recognized as a person with substantial rights. 1 Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Chapter 1, p. 126; Appendix B1-B2. *See also infra*, footnote 31.

[21] The first record that a sovereign rules with the consent of the governed appears to be I Sam. 16, II Sam. 5, 9-20, 1 Kings 1-2. When David's father died, he ruled over the seven tribes of Judah for seven years. Then the elders of Israel met with David at Hebron, and they made a contract for David to rule them as well. Thereafter David ruled over all of Israel and Judah for forty years. Other codes, most notably the Code of Hammurabi, were in writing, but were unilateral acknowledgments of human rights. The *Magna Carta, infra*, appears to be the first written document executed by both the sovereign and its subjects. The Constitution abolished traditional sovereignty, placed sovereignty in the People, signed by their representative, and ratified by them according to their respective state procedures.

rights,[22] it does define for whom the rights were created.[23] The Preamble. reads:

> "We, the People of the United States, in Order; to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." Appendix, p. A6.

The words "People of the United States" and "citizens" are synonymous terms.[24] The Preamble creates two classes of sovereignty, "ourselves" and "our Posterity."[25] Its purpose appears to be to include "Posterity[26] on an equal footing with, and having the same rights as, "ourselves" as evidenced by the parallel structure of the phrase. Therefore, 'Posterity" as to those who are lives in being is synonymous, if not with "citizenship,"[27] surely "personhood."[28] This understanding is consistent with an understanding of the meaning of "Posterity" in 1787.[29] In 1644, Milton argued that the, "Parliament could no more censure the issue of the mind than it could the issue of the

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[22] *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857); *Cruikshank, supra*, 92 U.S. (2 Otto) 542, 549. The 13th & 14th Amendments do not overrule *Scott*, but only remove the limitations found in Article I, thus enlarging the class of persons who are citizens.

[23] See, footnote 22, supra

[24] See, footnote 22, supra

[25] Lynch I , etc, supra, at page 1.

[26] "Posterity" is capitalized in the original. As a noun is capitalized only if it identified a particular person, place, or thing, it implies the framers considered the word important

[27] See footnote 9, *ante*. It is probably more accurate to say the conceived "unborn children" are persons who become a naturalized citizen (§ I, 14th Amendment), except that the right to vote comes at age 18. (26th Amendment)

[28] Supra, footnotes 22 & 27, and page 9, after "*pari materia.*"

[29] Lynch I, , etc. supra, at page 1

womb."[30] At common law, certain members of future generations, "unborn children",[31] were lives in being for the purposes of the Rule Against Perpetuities.[32] Moreover, prenatal injuries were to a limited extent recognized at Common Law,[33] and it does not appear that tort actions for the injuries were barred.[34] Had the framers used "and our heirs", it would have created the equivalent of a fee simple absolute with powers of alienation, a concept clearly inconsistent with the concept of "unalienable rights" in the Declaration of Independence[35] and the concept of an "indestructi-

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[30] Milton, AREOPAGITICA (1644).

[31] Ante at footnote20; Aristotle, Politics, VII, 1335b, 24-26; Aquinas, Summa Theologiæ, 1, q. 76, a. 5 and q. 118; Noonan, CONTRACEPTION, 86-88 (Harv. U. Press, 1965). The Old Testament provided a remedy against persons causing a miscarriage. Exodus 21:22. It is not repugnant to the 1st Amendment Establishment Clause merely because civil law corresponds to the tenets of some religions. *E.g., Witters v. Washington* Dept of Social Svcs for the Blind, 474 U.S. 481 (1986).

[32] Gray, THE RULE AGAINST PERPETUITIES (4th Ed.); *Alamo School Dist. v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960).

[33] "To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and die by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them. Lord Coke, repeated by Blackstone, at Book IV, p. 198. His reasoning may have been influenced by (1) "No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband." Magna Carta (1215), Art. 54. As her unborn child was not her husband, obviously, there was a failure of evidence. (2) Medical knowledge as to unborn children was quite primitive when compared to modern medical knowledge.

[34] *Sinkler v. Kneale*, 401 Pa 267, 164 A.2d 93, 94 (1960); *McIntosh v. Dill, supra*, 205 P. 917 (1922)); Halsbury's Laws of England (1st Ed, 1911) Infants §§ 132, 135. And it appears that at a minimum, these common law rights were intended by Congress to be preserved. 1 U.S.C., § 8(c) , Appendix C.

[35] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that Governments are instituted among Men,

ble and perpetual union,"[36] whereas if construed as a fee tail,[37] it would be consistent with an intent to create "unalienable rights" and a "perpetual union,"[38] for the protection of future generations, including the "unborn children".

The Constitution was submitted to the People for ratification.[39] Implicit in the Preamble is the concept that the Constitution is to be a social contract[40] wherein society promises the individual unalienable rights, in return for which the individual promises to

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deriving their just powers from the consent of the governed, ..." American Declaration of Independence, § 2; Schwartz, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY.

[36] *White v. Hart*, 80 U.S. (13 Wall.) 646 (1872) (On Preamble.)

[37] *Hertz v. Abrahams*, 110 Ga. 707, 36 S.E. 409 (1900); *Haward* v. Howe, 12 Gray (Mass.) 49 (1858); *Gannon* v. *Athright*, 183 Mo. 238, 81 S.W. 1162 (1904); *Kay v. Scates*, 37 Pa 31(1860); *Larew v. Larew*, 146 Va. 134, 135 S.E. 819 (1926); 28 AMERICAN JURISPRUDENCE, Second, Estates, § 53. *Cf.*, *Barber v. Pittsburgh*, F.W. & C.R. Co., 166 U.S. 83 (1897); *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644, aff'md 222 U.S. 16 (1911), (recognizing by *dictum* common law rule). The Constitution concerns estates and interests in land. Art. I, Sec. 8, cl. 17 (District of Columbia; Places purchased); Art. III, Sec. 3, cl. 2 (forfeitures); Art. IV, Sec. 2, cl. I (privileges and immunities), Sec. 3, cl. 2 (property of the United States); Amendment III (Quartering of soldiers); Amendment IV (Secure in . . . Houses); Amendment V (nor be deprived of. . . property. . . nor shall private property be taken. . . .")

[38] 28 AMERICAN JURISPRUDENCE, Second, Estates, § 53. *Cf.*, *Barber v. Pittsburgh*, F.W. & C.R. Co., 166 U.S. 83 (1897); *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644, aff'md 222 U.S. 16 (1911) (Recognized by dictum common law rule).

[39] 2 Farrand, Max, The Constitutional Debates, pp. 152, 163, 177, 193, 196,209, 565, 582, 590,651; 3 Rotunda, op cit., p. 663, note 1. Appendix A.

[40] E.g., Hobbes, LEVIATAN (1651); Locke, SECOND TREATISE OF GOVERNMENT (1690); Laqueur, THE HUMAN RIGHTS READER (1979).

conform to the laws of society that do not derogate[41] from unalienable rights. Mutual promises have always been considered sufficient consideration for enforceability.[42] As persons under the age of Capacity[43] could not consent,[44] it appears the framers intended adults to be of the class "ourselves," and all others, including "unborn children", of the class "Posterity."[45]

Taking the approach that "unborn children" are present members of "Posterity" answers a number of theoretical problems. *Casey, supra*, 505 U.S. at 860. (O'Connor, J.) First, it is the development of constitutional theory recognizing there is not just one right, or more precisely - life, at stake, but two, the mother's, a member of "ourselves," and her "unborn child", a present member of "Posterity." Second, it supports the proposition the State cannot force women to terminate pregnancy or engage in eugenics, because her "unborn child" is a person entitled to protection. Third, it sets a standard that termination of a pregnancy occurs as a result of natural birth, or based on necessary medical intervention for the preservation of both lives, if possible. Fourth, it assures a woman's right to medical intervention to preserve both lives, if possible, without undue state influence. Fifth, it takes the courts out of the quagmire of trying to guess when "viable" occurs. With conception, there is no guesswork. Finally, it

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[41] Verdross, *Forbidden Treaties In International Law*, 31 AJIL 571 (1937); Id, *Jus Dispositivum & Jus Cogens In International Law*, 60 AJIL. 55 (1966).

[42] Chitty on Contracts (23rd Ed, 1968) 134; Restatement, Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed. Raym., 909 (1703)(English Reports).

[43] "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State account of age." 26th Amend, § 2.

[44] Chitty on Contracts, op. cit..

[45] 2 Stephens Commentaries 342 (1841) .

does justice by respecting the Constitutional guarantee to protect human life.

IV.

THE GOVERNMENT HAS A RIGHT TO PROTECT THE "UNBORN CHILDREN"

The Constitution Provides, in relevant part:

"No person shall be ... deprived of life ... without due process of law." U.S. Cons., 5th Amend.

No American government may utilize tax money to take life without due process of law.[46] *E.g., Flash v. Cohen*, 392 U.S. 83 (1968). Assuming, *arguendo*, that "unborn children" are present members of "Posterity," they have a right to representation, 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill, supra*, 205 P. 917 (1922); 17 Halsbury's Laws of England, Infants §* 132, 135 (1st ed, 1911), to be heard on whether their lives should be terminated. *See generally, Midlane v. Central Hanover Bank*, 339 U.S. 706 (1950); *Furman v. Georgia*, 408 U.S. 238 (1972), and it progeny; *Cruikshank, supra*, 92 U.S. (2 Otto), at 549; I Blackstone, Commentaries, etc., p. 126, App, p. B1.

"Unborn children" have all of the characteristics of life.[47] See generally, *To be and not to be* , supra; Four-

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[46] A state has the obligation to provide police protection for its citizens at home. (Verdross, *Forbidden Treaties International Law*, 31 AJIL 571 (1937); Verdross, *Jus Dispositivum & Jut Cogens in International Law*, 60 AJIL 55(1966)). Protecting an individual through due process in American jurisprudence is derived from the *Magna Carta* (1215) . *Murray's Lessee v. Hoboken Land & Improvement* Co., 59 U.S. (18 How.) 272 (1856). McKechnie, *Magna* Carta; the Great Charter of King John. MeKechnie is the recognized scholar on the *Magna Carta*. 10 Halsbury's Statutes of England (4th Ed) Constitutional Law, 25 Edw. I *(Magna* Carta)(1297), p. 14, Notes, ¶ 2.

[47] Case & Stairs, Biology; OBSERVATION & CONCEPT (1971):, p. 110, excretion, pp. 122, 141, 143, 149-150; ingestion, pp. 70, 80; respiration, pp. 8, 51, 64, 77; irritation, pp. 267, 329, 330; repro-

teenth Amendment Personhood, supra, 72 St. John's L.R., at 534-39; Lynch I, supra; Lynch II, supra. Whether it can be ascertained at any point in time that "unborn children" are human is absurd;[48] if the parents are human they will be human.[49]

In the case of the partially born children, the case is even more compelling. The findings of Congress (Appendum, C7 – C8.) demonstrate the absurdity of the proposition that a partial birth abortion somehow protects the health of the mother. Indeed, the sole difference between a birth process in which the child survives, and the partial birth abortion, is that in the later the birthing process is interrupted for the sole purpose of killing the child, before allowing the process to be completed.

Given the obligation to ensure life is not taken without due process of law, it appears that the state has a legitimate interest in denying an absolute right to take the life of unborn or partially born children. The citizens of every state, appear to have a legitimate interest in ensuring safeguards sc that "unborn children" do not become victims of genocide. (E.g., *International Convention on the Prevention and Punishment of the Crime of Genocide,* Congressional Digest, December 1984; U.S. Const., Art. VI, cl. 2 (treaties).[50]

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duction, pp. 122, 163-165,298-299,327,329. A zygote has an individual developing life that is viable in *utero,* in contradistinction to the ovum and sperm, which are not. Id, pp. 324-327. See fn 48.

[48] See, *Stenberg v. Carhart,* supra, 530 U.S., at 953.

[49] The fact that the zygote is not viable extrauterine does not negate the existence of life. All life is environmentally dependent. No one would seriously consider sending an astronaut tied to an "umbilical cord" on a space walk to cut the cord to test whether or not there was viability; such a proposition is absurd. Similarly, a fetus securely within the womb will die if there is an abruption of the placenta. Jacobs, et al, MDs, OBSTETRICS AND GYNECOLOGY, FAMILY HEALTH & MEDICAL GUIDE (1979), page 93.

[50] Clearly, the Constitution implicitly recognizes the right to privacy. U.S. Const., 2d Amend. (Quartering of soldiers), and 4th

Accordingly, any law to the contrary would be void as repugnant to the doctrine of *jus cogens*.

In view of the foregoing, and the right of the government to "clothe [persons] with the privileges of citizenship", this court should grant certiorari to determine the viability of *Roe and its progeny* and to determine whether deference to the Congressional legislation regarding personhood and the ban on partial birth abortions in view of the plain language of the Preamble which appears to include the unborn as members of sovereignty to be protected.

CONCLUSION

Based upon the foregoing, this Court should grant certiorari, vacate the judgment of *Roe v. Wade*, 410 U.S. 113 (1973), and *overrule Roe* and its progeny as inconsistent with the plain meaning of "Posterity" in the Preamble, reverse and remand for further proceedings not inconsistent with this court's views.

Dated: 2/8/2005

RESPECTFULLY SUBMITTED,

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Amend (search and seizure); *Katz v. United* States, 389 U.S. 347 (1967), and its progeny. But the right to privacy is not absolute. See footnote 5, *supra*.

APPENDIX

EXCERPTS FROM FARRAND, MAX, THE CONSTITUTIONAL DEBATES*

[129]

COMMITTEE OF DETAIL, IV

* **

[Proceedings of the Convention, June 19 -- July 23.]

[152]

COMMITTEE OF DETAIL, IV

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VI

We the People of *(and)* the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New. Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

1.

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[163]

COMMITTEE OF DETAIL, IX

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* *Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitalization is exactly as found in Farrand's, which faithfully follows the manuscript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says, "Found among the Wilson Papers and in Wilson's handwriting. Portions in parentheses represent parts crossed out. Italics represent later insertions."

IX

[same as previously reported]

1.

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[177]

Monday MADISON August 6

MADISON

Monday August 6th. In Convention

*****

Mr. Rutlidge <delivered in> the Report of the Committee of detail as follows: *****

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

[196]

Tuesday MADISON

MADISON

Teusday August 7th. In Convention

****

The <preamble> of the Report was agreed to nem. con. So were Art: I & II.

[209]

Tuesday MCHENRY Augt 7

MCHENRY

Augt. 7.

****

The preamble or caption and the 1. and 2. article passed without debate ....

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[565]

COMMITTEE OF STYLE

Proceedings of Convention Referred to the Committee of Style and Arrangement.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

ARTICLE I.

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[590]

COMMITTEE OF STYLE

Report of Committee of Style

WE, the People of the United States, in order to form a more perfect union, to establish justice. insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

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[604]

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THURSDAY, SEPTEMBER 13,1787.

JOURNAL

Thursday September 13, 1787.

****

Resolved that the preceding Constitution be laid before the United States in Congress assembled, and

that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification.

[604]

[To postpoine the report respecting the 22nd and 23rd Ayes -- 9; noes -- 1.]

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To strike out the word "to" before establish justice Ayes—8; Noes---2.]

[641]

MONDAY, SEPTEMBER 17, 1787.

JOURNAL

Monday September 17, 1787.

Detail of Ayes and Noes

	The Constitution Unanimously agreed to.	To deliver over the Journal and papers to the President	
	[567]	[568]	[569]
New Hampshire	Aye	Aye	aye
Massachusetts	Aye	Aye	aye
Rhode Island	Aye	Aye	aye
Connecticut	Aye	Aye	aye
New York	Aye	Aye	aye
New Jersey	Aye	Aye	aye
Pennsylvania	Aye	Aye	aye
Delaware	Aye	aye	aye
Maryland	Aye	aye	no
Virginia	Aye	aye	aye
North Carolina	Aye	aye	aye
South Carolina	Aye	dd	aye
Georgia	Aye	aye	aye

MADISON

Monday Sepr. 17. 1787. In Convention

The engrossed Constitution being read, ...

Docr. Franklin rose with a speech in hand ...

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[643]

--- He then moved that the Constitution be signed ...

[644]

*****

On the question to agree to the Constitution enrolled in order to be signed. It was agreed to by all the States answering ay.

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[649]

MCHENRY

Monday Sepr. 1787.

Read the engrossed Constitution. Altered the representation in the house of representatives.

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[651]

THE CONSTITUTION

OF THE UNITED STATES

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

****

1 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND

atrocious a light, though it remains a very heinous miſdemeſnor[r].

AN infant *in ventre ſa mere*, or in the mother's womb, is ſuppoſed in law to be born for many purpoſes. It is capable of having a legacy, or a ſurrender of a copyhold eſtate made to it. It may have a guardian aſſigned to it[s]; and it is enabled to have an eſtate limited to it's uſe, and to take afterwards by ſuch limitation, as if it were then actually born[t]. And in this point the civil law agrees with ours[u].

2. A MAN's limbs, (by which for the preſent we only underſtand thoſe members which may be uſeful to him in fight, and the loſs of which only amounts to mayhem by the common law) are alſo the gift of the wiſe creator; to enable man to protect himſelf from external injuries in a ſtate of nature. To theſe therefore he has a natural inherent right; and they cannot be wantonly deſtroyed or diſabled without a manifeſt breach of civil liberty.

BOTH the life and limbs of a man are of ſuch high value, in the eſtimation of the law of England, that it pardons even homicide if committed *ſe defendendo*, or in order to preſerve them. For whatever is done by a man, to ſave either life or member, is looked upon as done upon the higheſt neceſſity and compulſion. Therefore if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; theſe, though accompanied with all other the requiſite ſolemnities, are totally void in law, if forced upon him by a well-grounded apprehenſion of loſing his life, or even his limbs, in caſe of his non-compliance[x]. And the ſame is alſo a ſufficient excuſe for the commiſſion of many miſdemeſnors, as will appear in the fourth book.

[r] 3 Inſt. 50.

[s] Stat. 12 Car. II. c. 24.

[t] Stat. 10 & 11 W. III. c. 16.

[u] *Qui in utero ſunt, in jure civili intelligun-tur in rerum naturâ eſſe, cum de earum commodo agatur.* Ff. 1. 5. 26.

[x] 3 Inſt. 483.

The

PARTIAL-BIRTH ABORTION BAN ACT OF 2003

PUBLIC LAW 108-105, SEE PAGE 117 STAT. 1201

[3 US CODE CONG & ADMIN NEWS]

DATES OF CONSIDERATION AND PASSAGE

House: June 4, 2003

Senate: March 10, 11, 12, 13, 2003

Cong. **Record Vol. 148** (2003)

House Conference Report No. 108-288, September 30, 2003

[To accompany S. 3]

The House Conference Report is set out below.

HOUSE CONFERENCE REPORT 108-288

[{HCR,} page 1]

.....

[{HCR,} page 9]

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 3), to prohibit the procedure commonly known as partial-birth abortion, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment struck all the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment that is a substitute for the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

Section 1: Short title

Section 1 of the conference report is identical to Section 1 of the House amendment and Section 1 of the Senate bill. Section 1 states that the short title of this measure is the "Partial-Birth Abortion Ban Act of 2003."

[U.S. Cong, Admin & Leg News Service, p 1273]

Section 2. Findings

Paragraph (1) in Section 2 of the conference report is substantially similar, with clarifications, to paragraph (1) in Section 2 of the House passed bill and paragraph (1) in Section 2 of the Senate passed bill. In paragraph (1) Congress finds that a moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion—an abortion in which a physician deliberately and intentionally vaginally delivers a living, unborn child's body until either the entire baby's head is outside the body of the mother, or, any part of the baby's trunk past the navel is outside the body of the mother and only the head remains inside the womb, for the purpose of performing an overt act (usually the puncturing of the back of the child's skull and removing the child's brains) that the person knows will kill the partially delivered living infant, performs this act, and then completes delivery of the dead

infant—is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.

Paragraph (2) in Section 2 of the conference report is identical to paragraph (2) in Section 2 of the House amendment and paragraph (2) in Section 2 of the Senate bill. In paragraph (2), Congress finds that rather than being an abortion procedure that is embraced by the medical community, particularly among physicians

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who routinely perform other abortion procedures, partial-birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances, their lives. Congress also finds that as a result, at least 27 States banned the procedure as did the United States Congress which voted to ban the procedure during the 104th, 105th, and 106th Congresses.

Paragraph (3) in Section 2 of the conference report is identical to paragraph (3) in Section 2 of the House amendment and paragraph (3) in Section 2 of the Senate bill. In paragraph (3), Congress finds that in Stenberg v. Carhart, 530 U.S. 914, 932 (2000), the United Stales Supreme Court, which did not have in front of it the extensive factual record compiled by Congress, construed the record in that case to support "he proposition that in some circumstances, [partial-birth abortion] would be the safest procedure" for pregnant women who wish to undergo an abortion. Congress also finds that as a result of having reached this conclusion the Court struck down the State of Nebraska's ban on partial-birth abortion procedures, concluding that it failed to include an exception for partial-birth abortions deemed necessary to preserve the "health" of the mother, and placed an "undue burden" on women seeking abortions.

Paragraph (4) in Section 2 of the conference report is identical to paragraph (4) in Section 2 of the House amendment and paragraph (4) in Section 2 of the Senate bill. In paragraph (4), Congress finds that the Court's decision was based on the Federal district court's factual findings that the partial-birth abortion procedure was statistically and medically as safe as, and in many circumstances safer than, alternative abortion procedures—findings which are contradicted by Congress's extensive factual record presented and compiled during the 104th, 105th, 107th, and 108th Congresses.

Paragraph (5) in Section 2 of the conference report is substantially similar, with clarifications, to paragraph (5) in Section 2 of the House passed bill and paragraph (5) in

[U.S. Cong, Admin & Leg News Service, p 1274]

Section 2 of the Senate passed bill. In paragraph (5) Congress finds that substantial evidence presented at the Stenberg trial, and the overwhelming evidence that was presented and compiled at extensive Congressional hearings, much of which was compiled after the district court hearing in Stenberg, and thus not included in the Stenberg trial record, demonstrates that a partial-birth abortion is never necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed, and is outside of the standard of medical care.

Paragraph (6) in Section 2 of the conference report is identical to paragraph (6) in Section 2 of the House amendment and paragraph (6) in Section 2 of the Senate bill. In paragraph (6), Congress finds that despite the dearth of evidence in the Stenberg trial court record supporting the district court's findings, the United States Court of Appeals for the Eighth Circuit and the Supreme Court refused to set aside the district court's factual findings because, under the applicable standard of appellate review, they were not

"clearly erroneous." Congress also finds that a finding of fact is clearly erroneous "when although there is evidence to support it,

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the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" Anderson v. City of Bessemer, North Carolina, 470 U.S. 564, 573 (1985). Congress also finds that under this standard, "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Id. at 574.

Paragraph (7) in Section 2 of the conference report is identical to paragraph (7) in Section 2 of the House amendment and paragraph (7) in Section 2 of the Senate bill. In paragraph (7), Congress finds that in *Stenberg,* the United States Supreme Court was required to accept the very questionable findings issued by the district court judge—the effect of which was to render null and void the reasoned factual findings and policy determinations of the United States Congress and at least 27 Stale legislatures.

Paragraph (8) in Section 2 of the conference report is identical to paragraph (8) in Section 2 of the House amendment and paragraph (8) in Section 2 of the Senate bill. In paragraph (8), Congress finds that under well-settled Supreme Court jurisprudence, it is not bound to accept the same factual findings that the Supreme Court was bound to accept in *Stenberg* under the "clearly erroneous" standard. Congress also finds that it is entitled to reach its own factual findings—findings that the Supreme Court accords great deference—and to enact legislation based upon these findings so long as it seeks to pursue a legitimate interest that is within the scope of the Constitution, and

draws reasonable inferences based upon substantial evidence.

Paragraph (9) in Section 2 of the conference report is identical to paragraph (9) in Section 2 of the House amendment and paragraph (9) in Section 2 of the Senate bill. In paragraph (9), Congress finds that in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Supreme Court articulated its highly deferential review of Congressional factual findings when it addressed the constitutionality of section 4(e) of the Voting Rights Act of 1965. Regarding Congress' factual determination that section 4(e) would assist the Puerto Rican community in "gaining nondiscriminatory treatment in public services," the Court stated that "[i]t was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations. * * * It is not for us to review the

[U.S. Cong, Admin & Leg News Service, p 1275]

congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support section 4(e) in the application in question in this case." Id. at 653.

Paragraph (10) in Section 2 of the conference report is substantively identical, with technical clarifications, to paragraph (10) in Section 2 of the House amendment and paragraph (10) in Section 2 of the Senate bill. In paragraph (10), Congress finds that Katzenbach's highly deferential review of Congress's factual conclusions was relied upon by the United States District Court for the District of Columbia when it upheld the "bail-out" provisions of the Voting Rights Act of 1965, (42 U.S.C. 1973c), stating that "congressional fact finding, to which we are inclined to pay great deference, strengthens the inference that, in those jurisdictions covered by the

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Act, state actions discriminatory in effect are discriminatory in purpose." *City of Rome, Georgia* v. *U.S.*, 472 F. Supp. 221 (D. D.C. 1979), affd, 446 U.S. 156 (1980). "

Paragraph (11) in Section 2 of the conference report is identical to paragraph (11) in Section 2 of the House amendment and paragraph (11) in Section 2 of the Senate bill. In paragraph (11), Congress finds that the Court continued its practice of deferring to congressional factual findings in reviewing the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. See *Turner Broadcasting System, Inc.* v. *Federal Communications Commission*, 512 U.S. 622 (1994) *(Turner I)* and *Turner Broadcasting System, Inc.* v. *Federal Communications Commission*, 520 U.S. 180 (1997) *(Turner If)*. Congress finds that at issue in the *Turner* cases was Congress' legislative finding that, absent mandatory carriage rules, the continued viability of local broadcast television would be "seriously jeopardized." Congress finds that the *Turner I* Court recognized that as an institution, "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here." 512 U.S. at 665-66. Although the Court recognized that "the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law,' "its "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence de novo. or to replace Congress' factual predictions with our own. Rather, it is to assure that in formulating its judgments Congress has drawn reasonable inferences based on substantial evidence." Id. at 666.

Paragraph (12) in Section 2 of the conference report is identical to paragraph (12) in Section 2 of the

House amendment and paragraph (12) in Section 2 of the Senate bill. In paragraph (12), Congress finds that three years later in *Turner II,* the Court upheld the "must-carry" provisions based upon Congress' findings, stating the Court's "sole obligation is 'to assure that, in formulating its judgments. Congress has drawn reasonable inferences based on substantial evidence.'" 520 U.S. at 195. Congress finds that, citing its ruling in *Turner I,* the Court reiterated that "[w]e owe Congress' findings deference in part because the institution 'is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon' legislative questions," Id. at 195, and added that it "owe[d] Congress' findings an additional measure of deference out *of* respect for its authority to exercise the legislative power." Id. at 196.

[U.S. Cong, Admin & Leg News Service, p 1276]

Paragraph (13) in Section 2 of the conference report is substantively identical, with technical clarifications, to paragraph (13) in Section 2 of the House amendment and paragraph (13) in Section 2 of the Senate bill. In paragraph (13), Congress finds that there exists substantial record evidence upon which Congress has reached its conclusion that a ban on partial-birth abortion is not required to contain a "health" exception, because the facts demonstrate that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care. Congress also finds

[{HCR,} page 13]

that it has been informed by extensive hearings held during the 104th, 105th, 107th, and 108th Congresses and passed a ban on partial-birth abortion in the 104th, 105th, and 106th Congresses. Congress finds that these findings reflect its very informed judgment that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a

woman's health,' and lies outside the standard of medical care, and should, therefore, be banned.

Paragraph (14) in Section 2 of the conference report is substantively identical, with technical clarifications, to paragraph (14) in Section 2 of the House amendment and paragraph (14) in Section 2 of the Senate bill. In paragraph (14), Congress, pursuant to the substantial and credible testimony received during extensive legislative hearings during the 104th, 105th, 107th, and 108th Congresses, lists its declarations regarding the partial-birth abortion procedure:

Paragraph (14)(A) in Section 2 of the conference report is identical to paragraph (14)(A) in Section 2 of the House amendment and paragraph (14)(A) in Section 2 of the Senate bill. In paragraph (14)(A), Congress declares that a partial-birth abortion poses serious risks to the health of a woman undergoing the procedure. Those risks include, among other things: an increase in a woman's risk of suffering from cervical incompetence, a result of cervical dilation making it difficult or impossible for a woman to successfully carry a subsequent pregnancy to term; an increased risk of uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position, a procedure which, according to a leading obstetrics textbook, "there are very few, if any, indications for * * * other than for delivery of a second twin"; and a risk of lacerations and secondary hemorrhaging due to the doctor blindly forcing a sharp instrument into the base of the unborn child's skull while he or she is lodged in the birth canal, an act which could result in severe bleeding, brings with it the threat of shock, and could ultimately result in maternal death. Therefore, Congress concludes that those who express the view that partial-birth abortion may be a safer method of abortion in some circumstances have never examined the severe risks of the procedure to the health of the

mother and have not demonstrated that this procedure is a safe, medically accepted, standard of care.

Paragraph (14)(B) in Section 2 of the conference report is identical to paragraph (14)(B) in Section 2 of the House amendment and paragraph (14)(B) in Section 2 of the Senate bill. In paragraph (14)(B), Congress declares that there is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures. Congress also declares that no controlled studies of partial-birth abortions have been conducted nor have any comparative studies been conducted to demonstrate its safety and efficacy compared to other abortion methods. Congress further declares that there have

[U.S. Cong, Admin & Leg News Service, p 1277]

been no articles published in peer-reviewed journals that establish that partial-birth abortions are superior in any way to established abortion procedures. Congress also declares that unlike other more commonly used abortion procedures, there are currently no medical schools that provide instruction on abort-

[{HCR,} page 14]

ions that include the instruction in partial-birth abortions in their curriculum.

Paragraph (14)(C) in Section 2 of the conference report is identical to paragraph (14)(C) in Section 2 of the House amendment and paragraph (14)(C) in Section 2 of the Senate bill. In paragraph (14)(C), Congress declares that a prominent medical association has concluded that partial-birth abortion is "not an accepted medical practice," that it has "never been subject to even a minimal amount of the normal medical practice development," that "the relative advantages and disadvantages of the procedure in specific circumstances remain unknown," and that "there is no consensus among obstetricians about its use." The association has further noted that partial-birth abor-

tion is broadly disfavored by both medical experts and the public, is "ethically wrong," and "is never the only appropriate procedure."

Paragraph (14)(D) in Section 2 of the conference report is identical to paragraph (14)(D) in Section 2 of the House amendment and paragraph (14)(D) in Section 2 of the Senate bill. In paragraph (14)(D), Congress declares that those who espouse the view that partial-birth abortion "may" be the most appropriate abortion procedure for some women in "some" circumstances, such as the plaintiff in *Stenberg* v. *Carhart* and the experts who testified on his behalf, have failed to identify such circumstances and base their opinion on theoretical speculation, not actual evidence that demonstrates the relative safety of this abortion procedure.

Paragraph (14)(E) in Section 2 of the conference report is identical to paragraph (14)(E) in Section 2 of the House amendment and paragraph (14)(E) in Section 2 of the Senate bill. In paragraph (14)(E), Congress declares that the physician credited with developing the partial-birth abortion procedure has testified that he has never encountered a situation where a partial-birth abortion was medically necessary to achieve the desired outcome and, thus, is never medically necessary to preserve the health of a woman.

Paragraph (14)(F) in Section 2 of the conference report is identical to paragraph (14)(F) in the House amendment and paragraph (l4)(F) in the Senate bill. In paragraph (14)(F), Congress declares that a ban on the partial-birth abortion procedure will advance the health interests of pregnant women seeking to terminate a pregnancy.

Paragraph (14)(G) in Section 2 of the conference report is identical to paragraph (14)(G) in the House amendment and paragraph (14)(G) in the Senate bill. In paragraph (14)(G), Congress declares that in light of this overwhelming evidence, Congress and the States have a compelling interest in prohibiting partial-birth abortions.

Congress also declares that in addition to promoting maternal health, such a prohibition will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life.

Paragraph (14)(H) in Section 2 of the conference report is identical to paragraph (14)(H) in the House amendment and (14)(H) in the Senate bill. In paragraph (14)(H), Congress declares that based upon *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), a governmental interest in protecting the life of a child during the delivery process arises, in part, by vir-

[U.S. Cong, Admin & Leg News Service, p 1278]

[{HCR,} page 15]

tue of the fact that during a partial-birth abortion, labor is induced and the birth process has begun. Congress further declares that this distinction was recognized in *Roe* when the Court noted, without comment that the Texas parturition statute, which prohibited one from killing a child "in a state of being born and before actual birth," was not under attack. Congress declares that this interest becomes compelling as the child emerges from the maternal body. Congress declares that a child that is completely born is a full, legal person entitled to constitutional protections afforded a "person" under the United States Constitution. Congress declares that partial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a "person." Partial birth gives the fetus an autonomy that is separate and distinct from that of the mother. Thus, the government has a heightened interest in protecting the life of the partially-born child.

Paragraph (14)(I) in Section 2 of the conference report is identical to paragraph (14)(I) in Section 2 of the House amendment and paragraph (14)(I) in Section 2 of the Senate bill. In paragraph (14)(I), Congress

declares that the distinction between a partial-birth abortion and other abortion methods has been recognized by the medical community, where a prominent medical association has recognized that partial-birth abortions are "ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside of the womb." According to this medical association, the " 'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body."

Paragraph (14)(J) in Section 2 of the conference report is identical to paragraph (14)(J) in Section 2 of the House amendment and paragraph (14)(J) in Section 2 of the Senate bill. In paragraph (14)(J), Congress declares that a partial-birth abortion also confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life. Congress further declares that a partial-birth abortion thus appropriates the terminology and techniques used by obstetricians in the delivery of living children—obstetricians who preserve and protect the life of the mother and the child—and instead uses those techniques to end the life of the partially-born child.

Paragraph (14)(K) in Section 2 of the conference report is identical to paragraph (14)(K) in Section 2 of the House amendment and paragraph (14)(K) in Section 2 of the Senate bill. In paragraph (14)(K), Congress declares that by aborting a child in the manner that purposefully seeks to kill the child after he or she has begun the process of birth, partial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world, in order to destroy a partially-born child.

Paragraph (14)(L) in Section 2 of the conference report is identical to paragraph (14)(L) in Section 2 of the House amendment and paragraph (14)(L) in Section 2 of the Senate bill. In paragraph (14)(L), Congress declares that the gruesome and inhumane nature of the partial-birth abortion procedure and its disturbing similarity

[U.S. Cong, Admin & Leg News Service, p 1279]

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to the killing of a newborn infant promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure.

Paragraph (14)(M) in Section 2 of the conference report is identical to paragraph (14)(M) in Section 2 of the House amendment and paragraph (14)(M) in Section 2 of the Senate bill. In paragraph (14)(M), Congress declares that the vast majority of babies killed during partial-birth abortions are alive until the end of the procedure. Congress further declares that it is a medical fact, however, that unborn infants at this stage can feel pain when subjected to painful stimuli and that their perception of this pain is even more intense than that of newborn infants and older children when subjected to the same stimuli. Evidence compiled by Congress demonstrates that fetuses on whom in utero surgery is performed for medical reasons feel pain from needles and instruments and are provided anesthesia. Pain management is an important part of care provided to infants cared for in neonatal units who are of the same gestational ages as those subject to partial-birth abortion. Partial-birth abortion is an extremely painful procedure for the fetus and, during a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain.

Paragraph (14)(N) in Section 2 of the conference report is identical to paragraph (14)(N) in Section 2 of the House amendment and paragraph (14)(N) in Sec-

tion 2 of the Senate bill. In paragraph (l4)(N), Congress declares that implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life. Congress further declares that as a result it has a compelling interest in acting—indeed it must act—to prohibit this inhumane procedure.

Paragraph (14)(0) in Section 2 of the conference report is identical to paragraph (14)(0) in Section 2 of the House amendment and paragraph (14)(0) in Section 2 of the Senate bill. In paragraph (14)(0), Congress declares that for these reasons, it finds that partial-birth abortion is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community; poses additional health risks to the mother; blurs the line between abortion and infanticide in the killing of a partially-born child just inches from birth; and confuses the role of the physician in childbirth and should, therefore, be banned.

Section 3. Prohibition on partial-birth abortions

Subsection (a) in Section 3 of the conference report is identical to subsection (a) in Section 3 of the House amendment and subsection (a) in Section 3 of the Senate bill. In subsection (a) of Section 3 Congress amends title 18 of the United States Code by inserting anew chapter 74 consisting of a new 18 U.S.C. 1531:

Subsection (a) of the new section 1531 contained in Section 3(a) of the conference report is identical to subsection (a) of the new section 1531 proposed in Section 3(a) of the House amendment and subsection (a) of the new section 1531 proposed in Section 3(a) of

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04-967

In the Supreme Court of the United States

Norma McCorvey,
Petitioner

v.

William "Bill" Hill,
Respondent

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

Brief *Amicus Curiae* of
Texas Black Americans for Life, Inc.,
and the
Life Education And Resource Network, Inc. (LEARN)

In Support of the Petitioner

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Interest of the *Amici* And Consent

The *amici*,[1] Texas Black Americans for Life, Inc., and the Life Education And Resource Network, Inc. (LEARN), educate people about genocidal aspects of abortion, and were *amici* in the Fifth Circuit. All parties granted consent to the *amici* to file this brief.

Summary of Arguments

In affirming the district court, the Fifth Circuit did one of three things: First, this case may be looked at as one in which the Fifth Circuit decided an important question of federal law which has not been, but which should be, decided by this Court. The question is whether, or under what circumstances, a lower court, when faced with a possible jurisdictional defect, may summarily dismiss, or must give fair notice and an opportunity to be heard regarding the alleged defect.

We argue that although it may be proper for a court to dismiss summarily when the defect is based on objectively ascertainable facts (such as where a filing is jurisdictionally out of time), this Court must now expound a rule saying that a court must not dismiss summarily, but must give fair notice and an opportunity to be heard, where the possible defect is based on a question of law and is more naturally the subject of briefing and argument than summary dismissal.

Because the Fifth Circuit based its decision on its understanding of the repeal of a state statute by implication, this precedent could be widely used in many different types of cases, producing other erroneous results and erroneous advice to counsel. And if this Court now leaves standing such

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[1] Counsel of record on this brief is the sole author of this brief. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

an obvious departure from due process, people will wonder whether this Court refused to deal with this issue simply because this is an abortion case, with "the wrong side" looking for justice, especially if this Court finds in a later case that it must then correct such an obvious departure from due process.

Second, in the alternative, if this Court does not deem this case to involve a new question of federal law, but rather a new application of old federal law, we argue that the Fifth Circuit decided an important question of federal law in a way that conflicts with relevant decisions of this Court regarding summary dismissal for lack of subject-matter jurisdiction and with the decisions of this Court which also generally obligate the courts to give fair notice and an opportunity to be heard.

Third, in the alternative yet again, by basing its decision on a point which had not been raised previously in the case, by canceling without notice or explanation the very oral argument at which the court could have asked counsel about this perceived jurisdictional flaw, and by denying the petition for a rehearing (which would have given counsel the chance to brief and argue the point), the Fifth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

In addition, the Fifth Circuit decided this case in a way which conflicts with the Seventh Circuit, which deemed it an abuse of discretion to dismiss for lack of subject matter jurisdiction when it was possible for the plaintiff to allege jurisdiction.

The Court will soon face cases involving fetal pain, starting with the federal partial-birth abortion cases. And now there is talk of a possible federal statute which would require doctors to tell pregnant mothers contemplating abortion that their unborn child will feel the pain of the procedure, and offer an

anesthetic for the child.[2] We then point out that *Roe v. Wade*[3] has caused great social unrest and damage even to this Court itself thus far, and that this damage is about to become worse as these pain-related cases arrive. This Court will not want to go into those cases alone. It will best posture itself to review those cases while the 5,347 pages of documents which the petitioner filed in the district court, including the affidavits of over 1,000 other women, are still under review in the proper evidentiary hearings.

Throughout all this, the Court should avoid a repeat of trying the "one big fix" approach to the subject of abortion which the Court tried to use, unsuccessfully, in *Roe* and *Planned Parenthood v. Casey*.[4] To avoid limiting its own options, and to expand its opportunities for best facing its upcoming challenges, this Court must grant certiorari.

ARGUMENTS

I. The Fifth Circuit Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Decided By This Court

A. The Important Question Of Federal Law:

Whether A Federal Court Must Give Fair Notice And An Opportunity To Be Heard Before Dismissal Where A Jurisdictional Defect Is Based On A Question Of Law

The Fifth Circuit based its decision on a suggestion that the statute in question had been repealed by implication, thus

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[2] Charles Babington, *Two Opponents of Abortion Are Tapped for Senate Judiciary Panel*, WASHINGTON POST, Dec. 21, 2004, at A23.

[3] *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

[4] *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

rendering the case moot.[5] On the issue of subject-matter jurisdictional defects, this Court has been clear: When faced with such a defect, a federal court must dismiss,[6] and must also search the record---even *sua sponte*, if need be---to ensure there is no defect in subject-matter jurisdiction.[7]

What has not yet been expressly stated, however, and what must now be decided by this Court, is whether, or under what circumstances, it is proper for a court in such a situation to dismiss summarily for such a defect, or dismiss only after giving fair notice and an opportunity to be heard. We submit that although a court may dismiss summarily when the jurisdictional defect is based on objectively ascertainable facts (such as where a filing is jurisdictionally out of time), it must also be the case that a court must give fair notice and an opportunity to be heard where the defect is a question of law and is more naturally the subject of briefing and argument than summary dismissal.

Fair notice and an opportunity to be heard are the very cornerstone of due process. As this Court has said,

> "The core of due process is the right to notice and a meaningful opportunity to be heard."[8]

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[5] *McCorvey v. Hill*, 385 F.3d 846, 848-849 (5th Cir. 2004).

[6] *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501, 511 (1986). (Note: The Fifth Circuit relied on *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 180, 120 S.Ct. 693, 704, 145 L.Ed.2d 610, 626 (2000). See *McCorvey*, at 385 F.3d 848. *Friends of the Earth*, in turn, relied on *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73, 117 S.Ct. 1055, 1071, 137 L.Ed.2d 170, 197 (1997), where *Bender* is cited.)

[7] *Andrus v. Charlestone Stone Products Co., Inc.*, 436 U.S. 604, 607, n. 6, 98 S.Ct. 2002, 2005, n. 6, 56 L.Ed.2d 570, 574, n. 6 (1978).

[8] *LaChance v. Erickson*, 522 U.S. 262, 266, 118 S.Ct. 753, 756, 139 L.Ed.2d 695, 700 (1998). See also, *Los Angeles v. David*, 538 U.S. 715, 716-717, 123 S.Ct. 1895, 1896, 155 L.Ed.2d 946, 949 (2003).

On that note, the Seventh Circuit has said that courts must resist the temptation "... to disregard procedural niceties, all in fulfillment of a confident sense of mission."[9]

The idea that a court, when faced with an issue of a jurisdictional defect, must give fair notice and an opportunity to be heard when the perceived jurisdictional defect is based on a argument of law, and is thus more a matter of briefing and argument than summary dismissal, is a point not yet expressly stated in this Court's jurisprudence. This case demonstrates the need for such a statement.

The point that a court should not have too heavy a hand does not seem to be lost on the Seventh Circuit, at least. We again refer this Court to what that circuit has said:

> "A court's discretion to dismiss for lack of subject matter jurisdiction when the plaintiff could have pleaded the existence of jurisdiction and when in fact such jurisdiction exists, should be exercised sparingly."[10]

We do fully agree, we should also note, that as a matter of general principle, this Court should defer to a lower court's interpretation of state law.[11] But we would also say as well that in our reading of the cases on which this doctrine is based, it would seem that those cases decided issues of state law only upon proper notice of the existence of such an issue, and full briefing and argument on the merits. That did not

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[9] *United States v. Board of School Commissioners*, 128 F.3d 507, 512 (7th Cir. 1997).

[10] *Hoefferle Truck Sales v. Divco-Wayne*, 523 F.2d 543, 549 (7th Cir. 1975).

[11] *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 204, 76 S.Ct. 273, 277, 100 L.Ed. 199, 206 (1956); *United States v. Hohri*, 482 U.S. 64, 74, n. 6, 107 S.Ct. 2246, 2253, n. 6, 96 L.Ed.2d 51, 61, n. 6 (1987).

happen in our case. Quite the opposite, in fact, was the case. In its opinion, the Fifth Circuit simply said:

> "We dispensed with oral argument in this case because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. Fed.R.App.P. 34(a)(2)."[12]

We respectfully disagree. We maintain instead that the failure to afford the petitioner fair notice and an opportunity to be heard constituted an abuse of discretion.

B. The Three Main Reasons Why This Court Should Decide This Question Of Law:

1. This Precedent Of The Fifth Circuit Will Produce Erroneous Results In Other Cases

We especially ask the Court to keep in mind that the Fifth Circuit did not base its decision on abortion law. It did not base it on constitutional law at all, in fact, other than the requirement of there being a live case and controversy, which the issue of mootness, of course, goes to. Neither did the court base its decision on Rule 60 or any of the other Federal Rules of Civil Procedure. It based it instead only on the idea of a repeal by implication, and the potential mootness resulting therefrom.[13]

The result is that this precedent, which ignores the basic right of receiving fair notice and an opportunity to be heard in considering a repeal by implication, can now be picked up in federal cases dealing with the regulation of taxicabs in Fargo, North Dakota, or the sale of goods under the Uniform

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[12] *McCorvey*, 385 F.3d at 847, n. 1.
[13] *McCorvey*, 385 F.3d at 849.

Commercial Code in Maine, Nebraska, or Hawaii. In fact, any time a federal court faces implied repeal, this case will be either governing precedent, or will be otherwise authoritative by virtue of the status of the Fifth Circuit.

2. This Precedent Of The Fifth Circuit Will Produce Erroneous Advice To Clients

This precedent in the Fifth Circuit will have an affect on how counsel will advise their clients in many different types of cases all across the country, cases which this Court might never even hear about simply because they will either be settled out of court, or perhaps because the parties will have conducted themselves differently in the way they handle the affairs of their own private lives before litigation is even considered. But how many cases and clients will be affected like that? How many *types* of cases will be affected like that? No one can know right now. And no one, in fact, ever will know if this precedent of the Fifth Circuit is left intact, though it may be followed by other courts and counsel.

3. This Court's Reputation Could Be Damaged By Denying Certiorari

What will this mean for this Court, then, if some day the Court concludes that it must finally review this due process issue in some later case? Leaving such a substantial departure from due process intact in this case, only to revisit it and modify it or overrule it in another case, will leave this Court open to the suggestion that the Court did not intervene this time only because abortion was involved, and because "the wrong side" was looking for justice. And that appearance, we submit, will impugn the integrity of this Court. This will be especially true because *Roe* still is, after all, this Court's leading current example of substantive due process. Substantive due process, though, is supposed to be supplemental to procedural due process.

How ironic, then, if this case should now also become the lead case in causing a departure from procedural due process as the lower courts follow this precedent. Letting things develop into such an ironic state of affairs would leave many shaking their heads, and would further impugn the integrity of this Court. In contrast to all of this, granting certiorari now will help nip these potential problems in the bud.

II. The Fifth Circuit Has Decided An Important Question Of Federal Law In A Way That Conflicts With Relevant Decisions Of This Court

Perhaps this Court will deem this instead to be just a new application of an old question of federal law (*i.e.*, a new duty to give fair notice and an opportunity to be heard in certain circumstances, when faced with the already-established duty to dismiss for lack of subject-matter jurisdiction). If so, we submit that the Fifth Circuit decided this case in conflict with other relevant decisions of this Court in at least two respects.

A. Dismissal Is Inappropriate Under *Steel Co. v. Citizens For A Better Environment*

Dismissal without any chance to argue the issue of a lack of subject-matter jurisdiction runs contrary to what this Court has said:

> "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction .... Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this

Court, or otherwise completely devoid of merit as not to involve a federal controversy.'"[14]

We submit that the petitioner established in the district court a basis for her Rule 60 motion which was sufficiently plausible and meritorious as to be at least *arguably* substantial, and also that it is at least *arguably* the case that the statute in question has not been repealed by implication.

B. Dismissal Violated This Court's Statements On Due Process

The Fifth Circuit apparently decided that its specific obligation to dismiss due to a jurisdictional flaw was somehow not to be read together with the other decisions of this Court which also generally obligate the courts, simultaneously, to ensure that the parties have fair notice and an opportunity to be heard in all proceedings before the court.[15] All of this, we think, is simply another way of wording the same ideas we address in our first argument, and we hereby incorporate herein by reference our statements and cases from that argument.

III. The Fifth Circuit Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Power

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[14] *Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 89, 118 S.Ct. 1003, 1010, 140 L.Ed.2d 210, 223-224 (1998) (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666, 94 S.Ct. 772, 777, 39 L.Ed.2d 73, 78-79 (1974)) (citations omitted).

[15] *LaChance v. Erickson*, 522 U.S. 262, 266, 118 S.Ct. 753, 756, 139 L.Ed.2d 695, 700 (1998). See also, *Los Angeles v. David*, 538 U.S. 715, 716-717, 123 S.Ct. 1895, 1896, 155 L.Ed.2d 946, 949 (2003).

By basing its decision on a point which was raised nowhere in the case,[16] by canceling without notice or explanation the very oral argument at which the court could have at least asked counsel about the perceived jurisdictional flaw, and by further denying the petition for a rehearing (which would have afforded the court and counsel the opportunity to discuss the issue in the briefing and at oral argument), the Fifth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Furthermore, the Fifth Circuit's decision to cancel oral argument seemed to come as an afterthought, coming as it did in the form of a handwritten note at the bottom of the order denying the law professors' motions to file an *amicus* brief and give oral argument thereon.[17] (A copy of that order is lodged with the clerk of this Court.)

We again submit that this is perhaps another way of looking at what we said in Arguments I and II, and we hereby incorporate herein by reference our statements and cases from those arguments.

IV. The Fifth Circuit Has Decided This Case In A Manner Which Conflicts With A Decision Of The Seventh Circuit On The Same Important Matter

As noted above in Argument I,[18] we refer to a statement of the Seventh Circuit in which that circuit took a much more dim view toward summary dismissal for lack of subject-matter jurisdiction than the Fifth Circuit took in this case.

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[16] A group known as Concerned Law Professors did raise the issue of repeal of the statute by implication in a brief which they sought to file by motion in the Fifth Circuit, but the court denied that motion.

[17] See note 16, *supra*.

[18] See note 10, *supra*, and accompanying text.

The question we now face is whether this constitutes a split of authority between the circuits on this point.

Granted, there are some differences from a split of authority in the classic sense. First, the Seventh Circuit was reviewing action taken by a district court; in the instant case, the summary dismissal was undertaken by the Fifth Circuit itself. Second, the Seventh Circuit was aware of the existence of the issue which it faced; the Fifth Circuit, by contrast, seemed to be unaware of any issue pertaining to whether its action should be summary in nature, or should come only after fair notice and an opportunity to be heard, and thus decided this question *sub silencio*.

Nonetheless, not only do these two circuits touch on the issue of whether (or under what circumstances) dismissal for a lack of subject-matter jurisdiction should be summary or not, but the action of the Fifth Circuit even goes beyond what the Seventh Circuit refused to countenance. For the Seventh Circuit rejected summary dismissal when counsel there had already neglected a duty to allege affirmatively the statutory basis of jurisdiction for quite a long time. In the instant case, by contrast, the petitioner was simply hit from out of the blue with an argument of law, the discussion of which, in inner chambers, her counsel was not even invited to attend. So counsel in the Seventh Circuit had had some notice, but the petitioner's counsel, in essence, had none. *Hoefferle Truck Sales,* we should also note, is still being followed in the Seventh Circuit,[19] and has also been followed or cited with approval by other courts.[20]

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[19] *Macklin v. United States*, 300 F.3d 814, 819-820 (7th Cir. 2002).

[20] See, *e.g.*, *Harary v. Blumenthal*, 555 F.2d 1113, 1115, n. 1 (2nd Cir. 1977), and *Cook v. United States*, 765 F.Supp. 217, 223 (M.D.Pa. 1991) (quoting *Hoefferle*: "court's discretion to dismiss for lack of subject matter jurisdiction when the plaintiff could have pleaded the existence of jurisdiction and when in fact jurisdiction exist[s] should be exercised sparingly.")

Furthermore, the very fact that the Fifth Circuit decided this issue *sub silencio* constitutes yet another reason for granting certiorari. For the issue is too important to let go *sub silencio*. And if this Court wants further development of this issue, it should, at a minimum, instruct the Fifth Circuit to consider this point and state its view expressly on whether, or under what circumstances, it is appropriate to dismiss summarily for lack of subject-matter jurisdiction, just to see if in fact the Fifth Circuit, upon express consideration of this issue, really would split with the Seventh Circuit on this point. We of course would prefer that this Court take this case to state right now that summary dismissal is inappropriate in the circumstances of a case like this. But in the alternative, this Court should at least require further development of this issue by the Fifth Circuit.

V. The Upcoming Abortion Cases Will Intensify The Harm To This Court Brought On By *Roe v. Wade*

This Court is about to face cases involving fetal pain. This will include pain inflicted in gruesome procedures taking place in the ninth month of gestation, procedures inflicted upon children who might be killed in hospitals in which other children of noticeably lesser gestational age, in rooms down the hall, are being delivered and saved, some possibly without even needing intensive care.

The cases will start with the ones involving the federal partial-birth abortion statute. Because of the proceedings in two of the three cases, this Court will face the issue of pain more squarely than it did in *Stenberg v. Carhart*.[21] In the Southern District of New York, Judge Casey held extensive evidentiary hearings on prenatal pain. Yet the evidence

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[21] *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000).

introduced therein formed no part of his decision in striking down the statute.[22] The case from the Northern District of California is even more telling of which way this issue is headed: Judge Phyllis Hamilton said in her opinion that if *Stenberg* is the law of the land, it doesn't matter if the unborn child feels pain.[23]

The Court will have to deal with the possibility that she is right. Also, an act has been proposed in Congress called the Unborn Child Pain Awareness Act. It will require doctors to tell mothers who have reached a certain stage of gestation that their child can feel the pain of the abortion, and offer an anesthetic for the child.[24]

In that light, let the Court now consider what one member of this Court who has consistently voted to uphold *Roe* has already said. We disagree with his honor on the law of abortion generally, and also with respect to at least one implication of the following statement. But perhaps the fact that even these *amici* find themselves in agreement with his honor on something substantive illustrates the unusual importance of this issue:

> "As a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth. There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet

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[22] *National Abortion Federation v. Ashcroft*, 330 F.Supp.2d 436 (S.D.N.Y. 2004).

[23] *Planned Parenthood Federation of America v. Ashcroft*, 320 F.Supp.2d 957, 1034 (N.D.Cal. 2004).

[24] Charles Babington, *Two Opponents of Abortion Are Tapped for Senate Judiciary Panel*, WASHINGTON POST, Dec. 21, 2004, at A23.

exist; respecting a developed fetus, however, that interest is valid."[25]

No matter what analysis this Court may use, it if strikes down the federal partial-birth abortion statute, with its pain-related implications, the Court will only inflame the issue even more. And if this Court had difficulty handling the unrest which was present in 1992, when it decided *Casey*, how is this Court going to handle what it will necessarily---unintentionally, but *necessarily*---sponsor in the near future?

This Court must also face the possibility that it could wind up deciding the fetal pain cases one way in the next couple of years, only to find that medical science has advanced a half dozen years later, bringing to light yet more facts which would undermine the basis of what the Court relied on for its decisions about fetal pain now. Locked into the straight jacket of constitutional precedent, legislatures could find themselves faced with the squarely conflicting duties of enacting laws for the sake of justice, on the one hand, while trying on the other hand to cope with the restrictions placed upon them by this Court, and by the lower courts applying what this Court might soon find itself saying in these upcoming pain cases.

Aside from the damage to society which has already ensued from *Roe* and *Casey*, the damage to this Court seems to have gotten worse since *Casey*, as was illustrated by Judge Jones in this case itself, in her unusual move of concurring in the very opinion of the court which she herself had authored.[26] Even the lay community expects the next confirmation battles for justices to this Court to be a resumption of the

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[25] *Webster v. Reproductive Health Services*, 492 U.S. at 569, 109 S.Ct. at 3084, 106 L.Ed.2d at 469 (1989) (Stevens, J., concurring in part and dissenting in part).

[26] *McCorvey*, 385 F.3d at 850 (Jones, J., concurring).

bruising spectacles which have gone before, as a recent article in *The Economist* makes clear.[27] What will then follow next for this Court, we wonder, in the wake of the pain-related cases, when they are all done?

VI. This Court Must Grant Certiorari To Resolve The Problem Which It Faces

If this Court denies certiorari, it goes into the next round of abortion cases with few options. It will face the pain-related cases head on, with little room to maneuver. It will have implicitly told the world that it is not interested in even looking at *Roe*, and that the next line of cases will be decided either by applying *Roe* full tilt, or by somehow trying to modify it again. The former approach, for the reasons stated above, will only lead to worse things than we have seen already; the latter one does likewise, and also feeds and nourishes a jurisprudence of doubt.[28]

If, however, in the wake of all the pain-related cases, and the pubic outcry attendant with them, this Court then concludes that it wants to go back and revisit *Roe* anyway, even if only just to modify it, how will it look if it then tries to dig it up? Will that look like the product of careful deliberations on its part? Or will it look more like retreat? Like caving in to pressure that it is unable to endure?

Let us now consider what the case will be if this Court grants certiorari. If so, the Court can do one of several things.

First of all, it can treat this case completely separate and distinct from the pain-related cases, including the partial-birth cases. We submit that there is more than enough

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[27] *The Coming Firestorm*, THE ECONOMIST, Jan. 1st-7th, 2005, at 19.

[28] See *Casey*, 505 U.S. at 844, 112 S.Ct. at 2803, 120 L.Ed.2d at 693 ("Liberty finds no refuge in a jurisprudence of doubt.").

substance to the nonpolitical, procedural aspects of this case to warrant granting certiorari. And remanding this case on those procedural considerations can then separate this case chronologically, by a considerable period, from the pain-related cases, if the Court should so desire.

On the other hand, the Court can consider this case with the first of the pain-related cases: the partial-birth cases. It may wish to order the parties to express their views on the possibility of consolidating this case with those, while holding this case in abeyance pending the presentation of those cases to the Court. Or it may wish to consider this case simultaneously with those cases without consolidation.

Consolidation, of course, would guarantee the intense adversarial clash which this Court prefers for its cases. We also wish to note, as we stated before,[29] that nineteen law professors sought to file an *amicus* brief in support of *Roe* in the Fifth Circuit and to give oral argument. Both motions were denied, but this does show that if the Court were to grant certiorari in this case even without consolidation, it would no doubt instantly hear from the supporters of *Roe* in the legal community, and would find itself faced with a choice of many competent organizations, law professors, and others who would be more than happy to brief their arguments and present oral argument thereon. The Court might wish to appoint a special master to advise the Court on which one or ones to allow to do so, and which others to leave in the status of *amicus curiae*, but we think this would work no hardship on, or prejudice to, the parties to this case themselves, or prove to be inconvenient for this Court.

Of course, the Court may even wish to remand this case first, while holding those other cases in abeyance pending the proceedings of this case down in the lower courts. After all,

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[29] See *supra*, notes 16 and 17, and accompanying text.

with respect to the plaintiffs' side in the partial-birth cases, the injunctions granted will still be intact the whole time; and with respect to the government's position, it will be in a far better position to argue its case in a framework in which a reconsideration of *Roe* is at least somewhat possible than it would be if a reconsideration of *Roe* were to be made more difficult by a denial of certiorari in this case. We do not mean to speak for them, of course. But the Court can order the parties to express their own opinions on such possibilities. And if the Court grants certiorari, this would immediately tell the supporters of *Roe* of this Court's renewed interest in this case, and they would no doubt then wish to defend *Roe* not only here, but also in the lower courts as well.

In any event, with *Roe* on the table for discussion at least academically, the Court need not go into the pain-related cases in a posture in which it has painted itself into a corner. Even if *Roe* is alive somewhere in the court system only with respect to procedural elements, it will take very little for this Court to open it up again to further consideration, if this Court so desires, in order to help it decide these cases in the very near future.

This can lead to a more careful deliberation, in the Court's own good time, of whether *Roe* should be reexamined, and with the most options for doing so, while the Court faces the most wrenching challenges to *Roe* that it will probably ever encounter. By contrast, this Court has already tried the "one big fix" approach to the issue of abortion twice before: in *Roe*, and in *Casey*. If those two cases illustrates anything at all, it is simply this: The "one big fix" approach has been tried, and it doesn't work. Instead, let the Court move more slowly and deliberately now, taking the time, in appropriate steps and measures, to consider the issue with greater patience, which itself, in turn, affords this Court more opportunity to apply its due diligence to the task at hand.

All things considered, then, which option would be better for this Court? We submit that this Court is much better off granting certiorari than denying it.

A. This Court's Own Statements Indicate That This Is An Opportune Moment To Grant Certiorari

In *Casey* this Court said it was hesitant to reconsider *Roe* where there had been a change of membership of the Court, coupled with a lack of any change in the facts or law, on the grounds that this would appear that it was overruling *Roe* on political grounds instead of on the basis of the rule of law.[30] This Court also said therein that it need not decide *Casey* as if *Roe* were before the Court in the first instance.[31]

We ask this Court to recognize that this case now comes before the Court in a perfect confluence of facts and circumstances for at least initiating the process of reexamining *Roe*. First of all, none of the changes in the membership of this Court since *Casey* would lead one to conclude that, if this Court were now to start the process of reexamining *Roe*, it would be acting out of a new political view of how *Roe* should have been decided in the first place.

Second, the voluminous documents which the petitioner filed in the district court showing the change in facts on a broad range of abortion-related issues generally, including documentation regarding the change (since *Roe*, and even *Casey*) in medical science's knowledge of the facts pertaining to the issue of prenatal pain specifically,[32] present this Court with a substantial basis for reconsidering *Roe* in

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[30] *Casey*, 505 U.S. at 864, 112 S.Ct. at 2813-2814, 120 L.Ed.2d at 706.

[31] *Ibid*, at 505 U.S. 871, 112 S.Ct. 2817, 120 L.Ed.2d 711.

[32] The change regarding our understanding of prenatal pain since *Roe* was noted by Judge Jones in her concurring opinion. See *McCorvey*, 385 F.3d at 852 (Jones, J., concurring).

light of an ever-changing body of facts, a body of facts which militates more and more with each passing year in favor of recognizing the proper role of a state in protecting unborn life. On that note, let the Court consider what it has said about the importance of facts and the factfinding process itself in constitutional adjudication:

> "We have frequently recognized the importance of the facts and the factfinding process in constitutional adjudication. See, *e.g.*, *Minnick v. California Dept. of Corrections*, 452 U.S. 105, 120-127 [101 S.Ct. 2211, 2219-2223, 68 L.Ed.2d 706, 717-722] (1981); *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 416 [84 S.Ct. 461, 465, 11 L.Ed.2d 440, 446] (1964) ('How the facts are found will often dictate the decision of federal claims'); *Townsend v. Sain*, 372 U.S. 293, 312 [83 S.Ct. 745, 756, 9 L.Ed.2d 770, 785] (1963) ('It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues'). Cf. *supra*, at 538-540, and n. 3."[33]

Third, although this case would not be before this Court in the first instance if the Court grants certiorari, it is nevertheless the exact same case itself, and it is the exact same plaintiff herself, a woman who is now seeking to have this Court recognize her right to have her own case reexamined at trial (for the sake of her reputation in the community and conscience, if nothing else), a woman who comes to court fully prepared to show this Court why and how it can begin the process of stopping at least some of the damage she feels she is responsible for, and how it can begin the process of reexamining its lead case in this most challenging field of law.

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[33] *Bender*, 475 U.S. at 542, n. 5, 106 S.Ct. at 1331, n. 5, 89 L.Ed.2d at 511, n. 5.

This is such a rare opportunity for this Court. When previously has the Court ever had the chance to have the lead plaintiff in one of its landmark cases come back and ask the Court if she can show it, through great detail in an evidentiary hearing, what it needs to know now in order to reconsider her case, especially in light of ever-changing facts and knowledge, and changes in our body of law?

Given the fact that this Court might soon find itself in a posture in which it would want to take advantage of all, or at least some, of the opportunities which this case can offer, could it not be said that the more prudent course to follow here would be to grant certiorari?

We do not see how this Court can feel comfortable denying certiorari, knowing that such a denial means that very soon it will go into the upcoming challenges before it and face them alone. For in those cases, this Court will then truly face the acid test of whether it can, within the framework of *Roe* as it now exists, balance the interests of the mother with "... the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth."[34]

Conclusion

Wherefore, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,
Lawrence J. Joyce
Counsel of record

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[34] *Webster v. Reproductive Health Services*, 492 U.S. at 569, 109 S.Ct. at 3084, 106 L.Ed.2d at 469 (1989) (Stevens, J., concurring in part and dissenting in part).